

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1046.

THE UNITED STATES, PETITIONER,

VS.

JAMES B. REGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT.

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## **Writ of Error.**

1

**United States of America, ss.:**

The President of the United States of America,  
to the Judges of the District Court of the  
United States, for the Southern District of  
New York, Greeting:

Because, in the record and proceedings, as also  
in the rendition of the judgment of a plea which  
is in the District Court, before you, or some of  
you, between United States of America, plaintiff,  
against James B. Regan, defendant, a manifest  
error hath happened, to the great damage of the  
said United States of America, as is said and  
appears by its complaint, We, being willing that  
such error, if any hath been, should be duly cor-  
rected, and full and speedy justice done to the  
parties aforesaid in this behalf, do command you,  
if judgment be therein given, that then under  
your seal, distinctly and openly, you send the  
record and proceedings aforesaid, with all things  
concerning the same, to the Judges of the United  
States Circuit Court of Appeals for the Second  
Circuit, at the City of New York, together with  
this writ, so that you have the same at the said  
place, before the Judges aforesaid, on the 10th  
day of July, 1912, that the record and proceed-  
ings aforesaid being inspected, the said Judges of  
the United States Circuit Court of Appeals for  
the Second Circuit may cause further to be done  
therein, to correct that error, what of right and  
according to the law and custom of the United  
States ought to be done.

2

3

WITNESS, the Honorable George C. Holt,  
Judge of the District Court of the  
United States for the Southern Dis-  
trict of New York, at the City of New  
York, this 11th day of June, in the  
year of our Lord one thousand nine

[L. s.]

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hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

THOS. ALEXANDER,  
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,  
U. S. District Judge.

[Filed June 11, 1912.]

5

### **Clerk's Certificate.**

UNITED STATES OF AMERICA, }  
Southern District of New York, } ss.:

6 I, Thomas Alexander, Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages numbered from 1 to 72, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of United States of America, plaintiff-in-error, against John B. Regan, defendant-in-error, as the same remain of record and on file in said office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of June, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

[L. S.]

THOS. ALEXANDER,  
Clerk.

**Summons.**

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF  
AMERICA,

Plaintiff,

*against*

JAMES B. REGAN,

Defendant.

*To the above-named Defendant:*

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

[L. S.] WITNESS, the Honorable George B. Adams  
and Honorable Charles M. Hough and  
Honorable George C. Holt, Judges of  
the District Court of the United States  
for the Southern District of New York,  
at the City of New York, this 29th  
day of April in the year one thousand  
nine hundred and nine.

THOMAS ALEXANDER,

HENRY A. WISE,

Clerk.

United States Attorney,

Plaintiff's Attorney,

Office and Post Office Address,

U. S. Court and P. O. Building,

Borough of Manhattan,

New York City.

10

**Complaint.****UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

UNITED STATES OF AMERICA,  
Plaintiff,

*against*

JAMES B. REGAN,  
Defendant.

11

The plaintiff above named by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, complaining of the above named defendant alleges on information and belief, as follows:

**FOR A FIRST CAUSE OF ACTION.**

*First.*—That at all the times hereinafter mentioned the defendant was and still is an inhabitant of and a resident in the Southern District of New York.

12

*Second.*—That on or about the eighth, ninth, tenth, eleventh and twelfth days of September, 1908, at London, England, the defendant herein interviewed, or caused to be interviewed, one Robert Foreau, who at that time resided in London, England, and was an alien and a foreigner and a citizen of France and not a citizen of the United States nor a resident within the territory of the United States of America, all of which the defendant well knew, and thereupon induced, solicited, assisted and encouraged the said Robert Foreau to migrate to the United States of America by then

and there offering, promising and agreeing to employ the said Robert Foreau as a pastry cook in the Hotel Knickerbocker, City of New York, United States of America, the said hotel being under the management and control of the defendant. 13

*Third.*—That thereupon, and prior to the importation and migration of the said Foreau into the United States of America, the said Foreau so induced and so solicited and encouraged by the said offer, promise and agreement so made to him by the defendant as aforesaid, did then and there accept and act upon the said offer and promise and enter into verbal contract with the defendant for employment as a pastry cook as aforesaid. 14

*Fourth.*—That thereupon, and on or about the twelfth day of September, 1908, by reason of the encouragement, persuasion, solicitation, inducement and assistance of the defendant herein, and by reason of the offer, promise and agreement so made to and with the said Foreau by the said defendant as aforesaid, the said Foreau did leave London, England, and did migrate to the United States of America per Steamship "Mauretania," entering into the said United States at the Port and Southern District of New York on or about the nineteenth day of September, 1908. 15

*Fifth.*—That the importation and migration of the said Robert Foreau to perform labor under the contract, promise or agreement as aforesaid, made previous to said importation and migration, was wholly and solely due to the assistance, encouragement and solicitation of said importation and migration made and offered by the defendant herein, and at the times of making and offering said assistance, encouragement and solicitation, and said

- 16 offers, promises and agreement, as well as at the times of said importation and migration, the defendant herein well knew that the said Foreau was an alien and a foreigner and not a resident in or a citizen of the United States of America, nor had he ever taken the oath of allegiance thereto.

*Sixth.*—That at the times hereinbefore mentioned there were to be found in the United States laborers of the same kind and class as the said Foreau, which laborers were unemployed and could have been employed in the place of said Foreau.

- 17 *Seventh.*—That by virtue of the premises and under and pursuant to Sections 4 and 5 of the Act of February 20, 1907, Chap. 1134, 34 Stat. L., 900, the defendant became liable to the United States in the sum of one thousand (\$1,000.00) dollars and that though duly demanded the same is still due and owing and no part of the same has been paid.

FOR A SECOND AND SEPARATE CAUSE OF ACTION.

Plaintiff here repeats Paragraph First hereof and further alleges upon information and belief as follows:

- 18 *Eighth.*—That on or about the eleventh day of September, 1908, at London, England, the defendant herein entered into a contract with one Robert Foreau, who at that time resided in London, England, and was an alien and a foreigner and a citizen of France and not a citizen of the United States nor a resident within the territory of the United States of America, all of which the defendant well knew, by which contract the said Robert Foreau for good and sufficient consideration bound himself to migrate to the United States of America and perform labor for the said defendant as a

pastry cook in the Hotel Knickerbocker, City of New York, United States of America, the said hotel being under the management and control of the defendant. 19

*Ninth.*—That thereupon and on or about the twelfth day of September, 1908, the defendant herein prepaid, or caused to be prepaid to the proper agents of the Cunard Steamship Company the passage money necessary to secure the transportation of the said Robert Foreau from England to the United States of America.

*Tenth.*—That thereupon, and on or about the twelfth day of September, 1908, by reason of the said contract so made between the said Robert Foreau and the said defendant as aforesaid, and by reason of the said prepayment of the transportation of the said Robert Foreau by the defendant as aforesaid, the said Robert Foreau did leave London, England, and did migrate to the United States of America per Steamship "Mauretania," entering into said United States at the Port and Southern District of New York, on or about the nineteenth day of September, 1908. 20

*Eleventh.*—That the importation and migration of the said Robert Foreau to perform labor under the contract as aforesaid made previous to said importation and migration, was wholly and solely due to the encouragement afforded by the defendant to the said Foreau by reason of the making of the said contract, and to the assistance rendered by the defendant to the said Foreau by reason of the prepayment of the passage money of the said Foreau by the defendant, and at the time of rendering the said encouragement and assistance as aforesaid, as well as at the time of said importation and migration, the defendant well knew that the said Foreau was an alien and a 21

- 22 foreigner and not a resident in or a citizen of the United States of America, nor had he ever taken the oath of allegiance thereto.

*Twelfth.*—That at the times hereinbefore mentioned there were to be found in the United States laborers of the same kind and class as the said Foreau, which laborers were unemployed and could have been employed in the place of the said Foreau.

- 23 *Thirteenth.*—That by virtue of the premises and under and pursuant to Sections 4 and 5 of the Act of February 20, 1907, Chapter 1134, 34 Stat. L., 900, the defendant became liable to the United States in the sum of one thousand (\$1,000.00) dollars and that though duly demanded the sum is still due and owing and no part of the same has been paid.

Wherefore, plaintiff demands judgment against the defendant in the sum of one thousand (\$1,000.00) dollars with interest thereon from the nineteenth day of September, 1908, together with the costs and disbursements of this action.

- 24 HENRY A. WISE,  
United States Attorney for the  
Southern District of New York,  
Attorney for Plaintiff,  
Office and Post Office Address,  
Room 50, Post Office Building,  
Borough of Manhattan,  
City of New York.

STATE OF NEW YORK,  
County of New York,  
Southern District of New York, } ss.:

25

Harold S. Deming, being duly sworn, deposes and says:

That he is an assistant to the United States Attorney for the Southern District of New York.

That he has read the foregoing complaint and knows the contents, thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

26

The reason why this affidavit is made by deponent and not by plaintiff is that the latter is a corporation sovereign.

Deponent further says that the sources of his information and the grounds of his belief are a transcript of the minutes of a Special Board of Inquiry into this case held by the Immigration authorities of the Port of New York, and his own inquiry into the facts of the case.

HAROLD S. DEMING.

Sworn to before me this 29th }  
day of April, 1909. }

27

Frederick L. Campbell,  
[SEAL] Notary Public,  
Kings County.  
Certificate filed in New York County.

[Filed, April 30, 1909.]

**Answer.****UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

THE UNITED STATES OF  
AMERICA,  
Plaintiff,  
  
against  
  
JAMES B. REGAN,  
Defendant.

The defendant answering the allegations contained in the complaint of the plaintiff herein, by his attorney Cornelius J. Earley:

*First.*—He admits Paragraph "First" of the complaint herein.

*Second.*—He denies each and every allegation contained in Paragraphs "Third," "Fifth," "Seventh," "Ninth," and "Eleventh" of the complaint herein.

80 *Third.*—He denies the allegations contained in Paragraphs "Second" and "Eighth," except that the Hotel Knickerbocker in the City of New York is under his control which he admits, and that one Robert Foreau, resided at the time herein alleged in London, England, and was an alien and a foreigner and a citizen of France and not a citizen of the United States, nor a resident within the territory of the United States of America, all of which facts he denies any knowledge or information sufficient to form a belief.

*Fourth.*—He denies the allegations contained in

Paragraphs "Fourth" and "Tenth" of said complaint, except that the said Robert Foreau did leave London, England, and did migrate to the United States of America per Steamship "Mauretania," entering into the said United States at the Port and Southern District of New York, on or about the 19th day of September, 1908, all of which facts he denies any knowledge or information sufficient to form a belief. 31

*Fifth.*—He denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs "Sixth" and "Twelfth" of said complaint. 32

*Sixth.*—He denies the allegations contained in Paragraph "Thirteenth" of said complaint, except that no part of the moneys alleged to be due have been paid.

Wherefore plaintiff demands judgment that the complaint herein be dismissed with costs.

CORNELIUS J. EARLEY,  
Defendant's Attorney,  
271 Broadway,  
Manhattan Borough,  
New York City.

33

STATE OF NEW YORK, }  
County of New York, } ss.:  
City of New York, }  
Borough of Manhattan, }

James B. Regan, being duly sworn, deposes and says: That he is the defendant in the within entitled action, that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge except to the matters therein stated to be alleged on information and be-

34 life, and that as to those matters he believes it to be true.

JAMES B. REGAN.

Sworn to before me this 21st }  
day of May, 1909. }

J. Otto Stack,  
Comr. Deeds,  
N. Y. Co.

[Filed May 22, 1909.]

**Judgment.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

35

UNITED STATES OF AMERICA

v.

JAMES B. REGAN.

Docket 5/439.

36

The above entitled action having come on to be tried at a stated term of this Court, held in the United States Court House and Post Office Building in the City of New York on the 7th and 8th days of February, 1912, before the Honorable James L. Martin, U. S. District Judge and a jury, and the issues having been heard by the jury, and the jury having returned a verdict in favor of the defendant, James B. Regan and against the United States of America, plaintiff,

Now, on motion of Henry A. Wise, United States Attorney for the Southern District of New York it is

Ordered and adjudged that the defendant have judgment against the plaintiff upon the merits.

Judgment signed and ordered this 1st day of April, 1912.

THOS. ALEXANDER,  
Clerk.

**Bill of Exceptions.**

37

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

UNITED STATES

v.

JAMES B. REGAN.

Before Hon. James  
L. Martin J., and  
a Jury.

New York, February 7, 1912.

**APPEARANCES:**

38

**HENRY A. WISE**, U. S. Attorney for the  
Government.**CLAUDE A. THOMPSON** and **ADDISON S.  
PRATT**, Assistant U. S. Attorneys, of  
Counsel.**MAX D. STEUER**, Attorney for Defendant.

A jury is impaneled and sworn.

Mr. Thompson opens the case on behalf of the  
Government.**JOHN J. DONOVAN**, called as a witness on be-  
half of the Government, being duly sworn, testi- 39  
fied as follows:

Direct examination by Mr. Thompson:

I am an employee of the Department of Com-  
merce and Labor at Ellis Island in the Immigra-  
tion Department. My duties are the grouping of  
aliens at present, but in June, 1909, I was report-  
ing and verifying in the department of aliens for  
deportation.

A man by the name of Robert Foreau was de-  
ported on the 19th day of June, 1909. He was  
placed under arrest on the 18th. The ship sailed

40 on the 19th. I know that he was placed aboard the vessel.

Q. Was deported under an order of the Commissioner of Immigration? A. Yes.

Mr. Steuer: I object as a conclusion of the witness, and as incompetent and hearsay and not the best evidence.

Objection sustained. Exception by the Government.

The Court: What did the witness say his duties were?

Mr. Thompson: Putting the aliens aboard the ship.

41

I have seen this paper. I had it signed by the chief officer on the receipt of the alien aboard the steamship Carmania. It was then delivered to me.

Mr. Thompson: The paper is offered in evidence.

Mr. Steuer: That is objected to as incompetent, no proper foundation laid for its introduction, and immaterial to any issue raised by the pleadings.

The Court: We will exclude that paper now.

Exception by the Government.

42

Q. Do you know whether or not Robert Foreau was deported? A. Yes, sir.

The Court: He is asking you of your own personal knowledge.

Q. Do you know of your own knowledge whether or not Robert Foreau was placed aboard the steamship Carmania on the 18th day of June, 1909? A. Yes, sir. I assisted in taking him aboard.

Mr. Steuer: I object to that as incompetent, calling for a conclusion of the witness, absolutely nothing to show here any knowl-

edge on the part of the witness as to who the individual was. 43

The Court: No, not so far. Strike out that answer.

Q. Do you know whether or not the Robert Foreau who you testify was placed aboard the vessel on the 18th of June was the same Robert Foreau that came to this country on the Steamship Mauretania on the 18th of September, 1908? A. To the best of my knowledge and belief he was the same man.

Mr. Steuer: I move to strike that answer out as being meaningless. 44

The Court: Yes.

Exception by the Government.

Q. How do you know that the man you put on board the vessel on the 18th day of June was Robert Foreau? A. He was brought to Ellis Island and was turned into my custody, offered to my custody, as Robert Foreau. I placed him aboard the Carmania as such person and received the receipt from the chief officer.

Mr. Thompson: I ask that this receipt be marked for identification.

Marked for identification Exhibit 1. 45

The Court: I think that receipt is admissible on the question of his knowledge.

Mr. Thompson: I now again offer in evidence this receipt, dated June 18th, 1909.

The Court: It will be admitted not as evidence that this man was deported but as evidence corroborating this witness' knowledge of the man that he saw go aboard that vessel to sail on that day. It is only as to his knowledge of the man that he saw go on board. It may be not at all satisfactory to the jury.

**Exhibit 1.**

Notice to Steamship Company to Deport Alien on  
Warrant.

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DEPARTMENT OF COMMERCE AND LABOR

Immigration Service

Office of the Commissioner  
New York

June 18, 1909.

47 To the Master, Person in Charge, Agent, Owner,  
or Consignee of the SS "Mauretania," Cunard  
Line,  
21 State Street, New York City.

Sirs:

You are hereby notified that the alien herein-  
after named, who reached this port on the above-  
named vessel on September 19, 1908, has been  
ordered returned to the country whence he came  
by the Secretary of Commerce and Labor, pur-  
suant to the provisions of section 21 of the act  
approved February 20, 1907.

48 Foreau, Robert; 35; France; Contract Laborer.  
Liverpool.

Respectfully,

Wm. Williams,  
Commissioner.

A

Received above named alien on SS "Carmania."

J. F. Simpson,  
Chief Officer.

Placed on SS Carmania.

Dated June 18, 1909.

Sailed June 19, 1909, 10:15 a. m.

Donovan,  
Deporting Officer.

Cross examination by Mr. Steuer:

49

I saw the person whom I took aboard that steamer for the first time on Ellis Island on June 18th. He was there among other persons.

Q. None of whom had you ever seen in your life before? A. Well, I saw several of them for a week or ten days previous to that.

All my knowledge concerning them was that they were there being held.

Q. And all you know about this man was that he reached there the day before and was being held? A. I don't know when he reached there, but he was taken away from there.

My best knowledge of him, my first knowledge of him was on the 18th.

50

That is all that I knew of the man.

By the Court:

Q. How did you know what his name was? A. His name had been verified from the hotel before the department warrant was issued for him.

Q. Do you know anything about it except what somebody told you? A. No, but I know the procedure, though.

Mr. Thompson: I will call the stenographer who took the testimony on the previous trial and offer his evidence previous to proving that this Robert Foreau was actually deported. I have sent to Ellis Island for the public record showing the deportation. It is just a little out of order.

51

The Court: Is there any objection to that?

Mr. Steuer: Not on the ground that it is not the order of proof, but to the testimony I object. I object to it on two grounds: First, that there is no foundation laid for the introduction of any such evidence, and second—

52

The Court: I do not think that the Government has proved that this man is not here within their reach.

Mr. Thompson: It is subject to our proving that.

The Court: Supposing they have proven that, then, what do you say?

Mr. Steuer: Then, I object on the ground that the evidence is incompetent, in that the defendant must be confronted by the witness and given an opportunity to cross examine.

53

The Court: I will take the testimony subject to the defendant's objection and exception.

---

FRANK C. PELTON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Thompson:

I am a law reporter; a stenographer, and have been in the neighborhood of twenty years.

54 I took the stenographic report of the evidence in the trial of the case of the United States v. James B. Regan, tried on the 15th day of June, 1909, and I transcribed the original minutes.

The original note book was left in the custody of Clarence A. Parsons, the official stenographer. I was employed by him, and the original notes were left with him. I later on left his employ, and his contract with the Government in the criminal end of the work lapsed, and he moved out of the building, and my understanding is he is dead, and that the notes have been destroyed.

Q. Mr. Pelton, have you made any effort to find your original note book? A. I saw Clarence

A. Parsons, the son of Clarence A., Sr. Mr. 55  
Clarence A., Sr., is dead, and his successor is  
Clarence, Jr., and he made an effort to find the  
notes and he has been unable to find them. He  
informed me that he was under the impression  
that his father, when he left this building, and  
went into the Tribune Building, had destroyed the  
notes.

The Court: Well, the whole thing boiled  
down is that you cannot find them.

The Witness: No, I cannot find them.  
Then never were in my custody.

I am able to say now, that I correctly tran- 65  
scribed the notes as I took them at the trial. I  
believe these to be the stenographic minutes in  
that trial transcribed by me.

The Court: Have you any doubt about it?

The Witness: No doubt whatever.

Mr. Thompson: I offer in evidence and  
wish to read to the jury the testimony of the  
witness Robert Foreau.

The Court: Admitted.

Mr. Thompson here read to the jury the  
deposition of Robert Foreau.

---

ROBERT FOREAU, sworn and examined by the 57  
Government testified, as follows (through the In-  
terpreter):

Direct examination by Mr. Deming:

Q. What is your nationality? A. French.

Q. How old are you? A. 31 years.

Q. What was your business in France? A. A  
pastry cook.

Q. Have you acted as a pastry cook in any other  
countries than France? A. Italy; I worked in  
Turkey and in England.

58 Q. Where have you been the last two months?  
A. At Ellis Island.

Q. What have you been doing there? A. I was detained there.

Q. You had no occupation there? A. No.

Q. When did you come to America for the first time? A. September 19, 1908.

Q. On what ship did you come? A. The Mauretania.

Q. Did you come as a second cabin passenger, steerage or first cabin? A. Second cabin.

Q. What did you do when you landed in New York? A. I took a car to go to the Knickerbocker  
59 Hotel.

Q. Did you go to the Knickerbocker Hotel; did you arrive there? A. Yes, sir.

Q. What did you do when you arrived there? A. I handed a letter to the elevator boy to bring it up to Mr. Regan.

Q. To whom was that letter addressed? A. To Mr. Regan, direct to the Knickerbocker Hotel, New York.

Q. What did you do after that? A. I took the elevator in the presence of the elevator boy and went to the apartments of Mr. Regan.

Q. What did you do when you went into the  
60 apartments; whom did you find there? A. Mr. and Mrs. Regan.

Q. What did you do? A. Mr. Regan had the letter in his hand, which I recognized as being the letter I sent up.

Q. You saw the letter in his hand, saw it was the—

Q. How did you know it was the letter you had sent upstairs? A. Because the stamp of the Carlton Hotel of London was on the envelope.

Mr. Earley: You say the envelope was stamped, as you have indicated?

The Witness: I mean the heading of the letter—not the envelope. 61

Mr. Earley: Did you have any conversation with Mr. Regan?

The Witness: After I came into his apartments Mr. Regan asked me if it is you Mr. Foreau.

Mr. Earley: Mr. Regan?

The Witness: Mr. Regan. Mrs. Regan acting as interpreter.

Q. Did Mr. Regan say anything to you directly?

A. No.

Q. Did Mr. Regan speak to Mrs. Regan in your presence? A. Yes. 62

Q. Did Mrs. Regan talk to you? A. Yes, sir.

Q. What did she say to you?

Q. Mr. Foreau did you speak to Mrs. Regan first or did she first address you? A. When I entered the apartments I said Good-day, Monsieur and Madam.

Q. What did Mrs. Regan say to you? A. She said: It is you sir, who came from London?

Q. Was that all she said to you? A. Mr. Regan read the contents of the letter which he held in his hand from the Carlton Hotel.

Q. Was that all she said to you: "It is you who have come from London?" A. She said: "Is it you, Mr. Robert Foreau, who has been sent to us by Mr. Neumann from the Carlton Hotel in London, at the rate of \$120 per month?" 63

Q. What did you say to that? A. I said yes.

Q. Was there any further conversation between you and Mrs. Regan? A. We talked about my trip and little things.

Q. Was there any further conversation between you and Mrs. Regan? A. Mr. and Mrs. Regan offered me a room for a couple of days at the hotel.

64

Mr. Earley: I move to strike that out.

The Court: Yes (to the witness). You must state what she said as near as you can, the words, <sup>and</sup> the substance of it. (To the Interpreter.) Tell him to repeat the conversation.

The Witness: They sent for the chief cook.

Q. State as fully and as completely as you can the rest of the conversation you had with Mrs. Regan after the remarks you have already told of? A. That is about all.

65

Q. What was the substance of the conversation to which he referred when he spoke about a room?

Q. State as nearly as you can the substance or the words, if you can, of the conversation to which you were referring when you spoke about a room? A. Mrs. Regan asked me if I had already engaged apartments in New York City, and I told her no.

Q. What did she say then? A. She said: We can give you a room for two or three days during the time you are looking for a room.

Q. What did you do after that conversation? A. After that conversation somebody telephoned to the chief cook from the kitchen.

66

Q. Where did you get the letter you sent up by the elevator boy? A. From Mr. Neumann, direct from the Carlton Hotel in London, he gave me that letter.

Q. When did you first get it? A. Friday, the 11th of September.

Q. What day did you sail for New York? A. On Saturday, the 12th of September.

Q. Did Mr. Neumann have any conversation with you at the time of giving you that letter? A. Yes, sir.

To the question, "State the substance of

the conversation which you had with Mr. Neumann at the time Mr. Neumann gave you the letter which you presented to the elevator boy?" Mr. Steuer objected as clearly incompetent and not binding on the defendant. 67

The Court: As the case now stands that is excluded.

Mr. Thompson: May it be admitted subject to our connecting Mr. Neumann with Mr. Regan?

The Court: No.

Mr. Thompson: Then, I will suspend reading this until after I have introduced the deposition of Mr. Neumann. 68

Mr. Thompson: I offer in evidence the deposition of the witness Sebastian Neumann, taken the 25th of August, 1911, at the United States Consulate in London, England, pursuant to a commission bearing date the 7th of August, 1911, and with the deposition I offer the commission and the return on the commission.

### **Commission.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK. 69

UNITED STATES

v.

JAMES B. REGAN.

Sir:

Please take notice that the depositions of the witnesses Mr. Neumann, manager of the Carlton

- 70 Hotel, London, England, and August Escoffier, will be taken on the 17th day of August, 1911, at 2 o'clock P. M., and thereafter from day to day as the taking of the depositions may be adjourned, under and pursuant to an order of this Court entered herein on the 31st day of July, 1911, before the United States Consul or the United States Vice-Consul at London, England, pursuant to commission duly issued out of this Court on the 7th day of August, 1911.

Dated New York, August 7, 1911.

- 71 HENRY A. WISE,  
United States Attorney for the  
Southern District of New York,  
Attorney for Plaintiff,  
Office and Post Office Address,  
Room 50, P. O. Building,  
Borough of Manhattan,  
City of New York.

To

Max D. Steuer, Esq.,  
Attorney for Defendant,  
115 Broadway,  
New York City.

- 72 The President of the United States of America,  
to the United States Consul, London, England.  
The United States Vice-Consul, London, Eng-  
land.

Know ye, that we, with full faith in your prudence and competency, have appointed you Commissioners and by these presents do authorize you or either of you to examine Mr. Neuman, Manager Carlton Hotel, London, England.

Mr. August Escoffier, as witnesses in a certain action pending in the District Court of the United States for the Southern District of New

York, wherein the United States is plaintiff and James B. Regan is defendant, on oath, upon oral interrogatories and to take and certify the depositions of the witnesses and return the same and the Commission according to the directions given in or with the Commission, and hereto annexed. 73

The Commission, when executed, is to be returned to the Clerk of the District Court of the United States for the Southern District of New York.

WITNESS, the Honorable Edward D. White,  
the 7th day of August, one thousand  
nine hundred and eleven.

Attest:

THOS. ALEXANDER,  
Clerk. 74

Deposition of a witness produced, sworn and examined the 25th day of August, in the year one thousand nine hundred and eleven at the United States Consulate, Orient House, 42-45 New Broad Street, London, County of Middlesex, United Kingdom of Great Britain and Ireland, under and by virtue of a commission issued out of the United States District Court for the Southern District of New York, in a certain cause therein, depending and at issue between the United States of America, plaintiff, and James B. Regan, defendant, as follows: 75

Commissioner John L. Griffiths, Esquire, United States Consul, having been duly notified of the time and place of the taking of the annexed depositions agreed to the taking of the same by the second named Commissioner, viz.: Richard Westcott, United States Vice-Consul at London, England.

A. Stone Hurst, of 2 Brick Court, Temple, Lon-

- 76 don, E. C., a stenographer and disinterested person, is appointed by the Commissioner to take down the depositions in shorthand, he being duly sworn to take correct notes of the depositions in shorthand and make a faithful transcript thereof into typewriting.
- 

Counsel: Mr. ADDISON S. PRATT, Solicitor, United States, Attorney for the Southern District of New York, for the Plaintiff.

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77

SEBASTIAN NEUMANN, residence Carlton Hotel, London, W., occupation, Hotel Staff Manager, aged 49 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

Examined by Mr. Addison S. Pratt:

Q. What is your business? A. I am Staff Manager at the Carlton Hotel, London.

Q. How long have you been Manager? Five years.

- 78 Q. Do you know Mr. James B. Regan, the proprietor of the Knickerbocker Hotel, New York City?  
A. Yes.

Q. How long have you known him? A. Since I have been at the Carlton.

Q. That is for the last five years? A. No, I have known him four years.

Q. Do you know a man by the name of Robert Foreau? A. Yes.

Q. When did you first meet Mr. Foreau? A. On the day before he sailed to New York.

Q. That was in what month? A. September, 1908.

Q. How did you happen to become acquainted with Mr. Foreau? A. He was introduced to me by our sub-chef, Mr. Alexander Gasteaud. 79

Q. How did Mr. Gasteaud happen to introduce him to you? A. By my request.

Q. Why did you request him to do so? A. A cable arrived on the previous day addressed "Escoffier, Carlton Hotel, London."

Q. Can you tell me what was in that cable to the best of your recollection? A. "Please engage Pâtissier"—he gave the French word—"120 dollars month. Passage paid. Sail first boat." This cable was signed to the best of my belief "Maxime and Regan." 80

Q. What did you do with that cable? It was addressed to Mr. Escoffier. A. It was addressed to Mr. Escoffier, who was absent on his annual monthly holiday.

Q. And for that reason you opened it? A. For that reason I opened it as I open all telegrams and cables addressed to him.

Q. You have authority from Mr. Escoffier to open letters and telegrams? A. I do not open his letters.

Q. You have authority to open telegrams and cables? A. Yes, and I open business letters.

Q. Addressed to him at the Carlton Hotel? A. Yes. 81

Q. Who is Mr. Escoffier? A. The Maitre Chef of the Carlton Hotel.

Q. How long has he been in the employ of the Carlton? A. Twelve years.

Q. What did you do with that cable after you had opened it? A. As soon as I read its contents I went down to the kitchen where Mr. Gasteaud was in charge owing to Mr. Escoffier's absence, and handed the cable to him. I ought to mention that Mr. Gasteaud was Chef to Mr. Regan for some

82 years. He went from the Carlton to Mr. Regan, and leaving Mr. Regan he came back to the Carlton, Mr. Maxime being his successor.

Q. Maxime at the Knickerbocker? A. Yes.

Q. Maxime is the name of the man which was signed to the cable? A. Yes. After perusing this cable Mr. Gasteaud told me "I will get the right man for you to sail on the Mauretania on Saturday."

Q. What day of the week did the cable come? A. To the best of my belief on Thursday afternoon.

Q. September 12 was Saturday. A. Yes, and on September 10th, which was a Thursday of course, this cable was received. That evening Mr. Gasteaud told me: "I have found the Patisier, who will call upon you tomorrow morning." The next morning, Friday, Mr. Foreau called upon me, and I asked him whether he would go out to the Hotel Knickerbocker at a salary of 120 dollars a month and his passage paid. He was quite anxious to accept the position. Thereupon I ran across a friend of mine, Mr. Everest, the Manager of the Cunard Company in Cockspur Street. He shrugged his shoulders and said he could not possibly find room for him on the Mauretania, which was fully booked.

84 Q. The Mauretania was the boat that was to sail on the 12th? A. Yes, and she being a very fast boat, I decided to send him right away. Mr. Everest, however, set to work at once with Liverpool to see if he could possibly get him away, and informed me at 6:30 that if I would call with Mr. Foreau at 10 o'clock next morning he would have his ticket ready for him.

Q. Then did you notify Mr. Foreau after that? A. Mr. Foreau came to the Hotel on Saturday morning. I informed Mr. Gasteaud to tell Mr. Foreau that it was all right. Mr. Foreau was present when Mr. Everest told me all this.

Q. You think Mr. Foreau was present when Mr. Everest told you all that? A. Yes. So I told Mr. Foreau to call upon me at the Carlton at 10 o'clock Saturday morning, and when I went over with him to the Cunard office Mr. Everest submitted several papers to me which I filled out with my own hand asking the questions of Mr. Foreau, and inserting the answers in the respective spaces. 85

Q. One of the papers which you have just referred to is this pink paper, which is marked Exhibit 1, dated June 15th, 1909, is it not? A. Yes, I have seen this paper before.

Q. Is this not your handwriting? A. That is my handwriting right from the beginning; in fact everything except the signature is mine. 86

Q. And Mr. Foreau signed that in your presence? A. He signed that in my presence and Mr. Everest on the 12th September.

Document produced to witness, identified by him, put in, marked Exhibit S. N. 1 and signed both by the Commissioner and the witness.

(This is printed at the end of the deposition.)

Q. There were some papers you had to sign for the ticket, were there not? A. I think so. I do not remember whether there were two or three. This was the only big paper I know. It strikes me there was a smaller paper, a white one. 87

Q. Then what was done. Did Mr. Foreau then take the train to Liverpool? A. Mr. Foreau then took the train at 12 o'clock from Euston Station, the special boat train from Euston at 12 o'clock, and went straight on to Liverpool.

Q. Who paid Mr. Everest for Mr. Foreau's passage? A. I did.

Q. How much did you pay? A. I believe L12.10.0 was the amount, or L12.12.0. I would not be sure.

88 Q. How did he travel; first class or second class?  
A. Second.

Q. Did you advise Mr. Regan that you had got Mr. Foreau for him? A. I cabled to the Knickerbocker.

Q. You cabled to Mr. Regan or to the Knickerbocker? A. "Hotel Knickerbocker, New York."

Q. What day did you send that cablegram? A. I believe on the Saturday.

Q. The morning that Mr. Forean left? A. Yes, saying: "Pattissier sailing Mauretania," and signing "Escoffier" to the cable.

89 Q. Did Mr. Regan ever acknowledge the receipt of your cable? A. Not to me.

Q. Do you know whether he did to Mr. Escoffier? A. I am sure of it: and to the best of my belief he refunded the money to Mr. Escoffier.

Q. Mr. Regan did not pay the money back to you? A. He does not know me sufficiently for that. You see everything went in the name of Escoffier.

Q. You paid this money for Mr. Foreau's passage? A. For Mr. Escoffier.

Q. Out of your own pocket? A. No. I took it from the hotel in Mr. Escoffier's name.

90 Q. In other words you got the cashier of the hotel to advance it to you? A. To advance the amount to Mr. Escoffier on my signature.

Q. And to give the money to you? A. Certainly.

Q. Was that money subsequently repaid to the hotel? A. That was repaid to the hotel by Mr. Regan, on 2nd October, 1908.

Q. You know that to be the fact? A. Yes, that is the fact. There are records of that transaction in the Carlton Hotel office. I obtained the signature of the Chief Accountant for this.

Q. You filled up this pink sheet? A. Yes.

Q. These are answers to questions? A. Yes.

Q. Did you ask Mr. Foreau to give you the information with which to fill out those answers? 91

A. Certainly. I translated every question to him in French, and he gave me the replies.

Q. And he saw you write those answers? A. He sat side by side with me.

Q. Do you know whether Mr. Regan and Mr. Escoffier are friends? A. They are great friends.

Q. And are Mr. Escoffier and Mr. Maxime friends also? A. Certainly, Mr. Maxime was one of his apprentices.

Q. Did Mr. Maxime serve his apprenticeship in the Carlton Hotel? A. He served an apprenticeship under Mr. Escoffier previously to his coming to the Carlton, and I believe he has been with him at the Carlton until he joined the Hamburg Amerika Line when the Carlton opened a restaurant on the "Kaiserin Auguste Victoria," and the "Amerika." 92

Q. Subsequently Mr. Maxime left the employment of the Hamburg Amerika Line? A. Subsequently Mr. Maxime left the employment of the Hamburg Amerika Line and remained at New York.

Q. At the Knickerbocker? A. At the Knickerbocker. He was assistant to Mr. Gasteaud. Mr. Gasteaud was the Chef at that time at the Knickerbocker, and Mr. Maxime the assistant chef. 93

Q. That was the same Mr. Gasteaud who is now at the Carlton? A. who is now at the Shenley at Pittsburgh.

Q. Is that the same man? A. Yes. He was at the Carlton at the time. He has since gone to the Shenley at Pittsburgh.

Q. What was done with the cable that was received from Mr. Maxime and Mr. Regan? A. On Mr. Escoffier's return to London after his holiday I handed him about a hundred telegrams, cables and letters, including this one.

94 Q. What did he do with this one? A. After having read this one the thing was done with, and he threw it in the basket.

Q. Did you give Mr. Foreau a letter of introduction or anything of that kind to Mr. Regan? A. Yes, I gave him a letter of introduction.

Q. Did you tell Mr. Foreau when you paid his passage that you were paying it for Mr. Regan? A. I had previously shown him the cable which stated "Passage paid."

Q. Mr. Foreau could not read the cable, could he? A. Yes, I think he spoke sufficient English for that, but I told him at the same time "Your  
95 passage is paid."

United Kingdom of Great Britain and  
Ireland, County of Middlesex, London, } ss.:  
England.

I, Richard Westacott, United States Vice-Consul at London, England, do certify that, no one appearing under this notice on the 17th day of August, 1911, either for the defendant or for the plaintiff, Sebastian Neumann, the witness personally appeared before me on the 25th day of August, 1911, at 3 o'clock in the afternoon at the United  
96 States Consulate at London, England, viz: Orient House, 42/45 New Broad Street, and after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, which evidence was taken down in shorthand and reduced to typewriting, and was on the 28th day of August, 1911 read over by the witness, who did in my presence subscribe the same. And I further certify that I have subscribed my name to each half sheet thereof.

And I further certify that Mr. Addison S. Pratt,

Counsel, appeared in behalf of the plaintiff, no 97  
one appearing in behalf of the defendant.

**RICHARD WESTACOTT,**  
United States Vice-Counsel  
at London, England.  
Commissioner.

R. M. S. "Mauretania."

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Second Saloon.

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Second Sitting.

Breakfast at 8:15 a. m.

Dinner " 1:0 p. m.

Tea " 5:54 p. m.

Seat No. 204

98

**Exhibit SNI, June 15, 1909.**

Please have this Form fully subscribed to and  
returned to

The Cunard Steam Ship Company, Limited, B  
8 Water Street, Liverpool.

Contract Ticket No.....

**CUNARD LINE.**

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99

Notice to Second Cabin Passengers.

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The United States Authorities, in accordance  
with the Immigration Law of March, 1893, re-  
quire that all ALIEN PASSENGERS, whether  
resident in the United States, those who have  
only taken out first papers, intending Settlers,  
Tourists, Visitors, or in transit through the

- 100 States to another Country, must answer all the following Questions.

UNITED STATES CITIZENS require to answer Questions 1 to 10 and 24.

THE CUNARD STEAMSHIP COMPANY,  
LIMITED.

1. Steamer *Mauretania*, sailing from Liverpool on the 12th Septer., 1908.
2. Name in full—Robert Foreau.
3. Age—35 years 3 months.
4. Sex—Male.
5. Married or Single—Married.
- 101 6. Calling or Occupation—Cook.
7. Able to Read or Write—Yes, both.
8. Nationality (country owning political allegiance or which citizen or subject)—French.
9. \*Race or People—French.

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\* "Race or People" is to be determined by the stock from which they sprang and the language they speak. List of races will be found back of this sheet.

10. Last Residence (address in full and how long resident there)—American address, Hotel Knickerbocker, New York. Address in the United Kingdom, 27 Trinity Square, Brixton, S. W.
- 102

11. Name and complete address of nearest relative or friend in country where you came from—Mrs. Robert Foreau, 27 Trinity Square, London, S. W.

12. Final destination, if any, beyond port of landing—Name of State, . City or town, New York.

13. Whether having a ticket to such final destination—Yes, to New York.

14. By whom was passage paid—Mr. Regan, Hotel Knickerbocker, New York.

15. Whether in possession of \$50, and if less, 103  
how much—Yes.

16. Whether ever before in the United States,  
and if so, when—No. Where,

17. Whether going to join a relative or friend,  
and if so, what relative or friend; his name and  
complete address—No.

18. Ever in Prison or Almhouse or Institution  
for care and treatment of the insane, or supported  
by charity; if so, which—No.

19. Whether a Polygamist—No.

20. Whether an Anarchist—No.

21. Whether coming by reason of any offer,  
solicitation, promise, or agreement, express or 104  
implied, to labor in the United States—Agree-  
ment.

22. Condition of Health, Mental and Physical  
—Excellent health.

23. Deformed or Crippled, Nature, Length of  
Time and Cause—Right leg is stiffened, owing  
to an operation at St. Louis Hospital in Paris,  
1893.

24. If of other than British nationality, and  
already residing in the United Kingdom, state  
original port of arrival in the United Kingdom  
and date—No.

25. Personal Description—Height, 1 m. 72 feet 105  
inches. Complexion, . Color of hair,  
dark. Color of eyes, . Marks of identifica-  
tion, .

26. Place of birth—Country, France. City or  
town, Joinville-le-Point, Department, Seine.

I hereby certify that I have made true answers  
to the questions which were asked in language  
understood by me and which answers have been  
recorded above.

(Sign here.)

*Robert Foreau*

## 106 Endorsement:

At The Execution of a Commission  
For The Examination of Witnesses  
Between United States, Plaintiff, v.  
James B. Regan, Defendant, This  
Exhibit Numbered SN1 and hereto  
Annexed was Produced And Shown  
to

Sebastian Neumann

And By Him Deposed Unto and  
Subscribed By him At The Time Of  
His Examination Before

R. Westacott,  
Commissioner.  
S. Neumann,  
Witness.

107

Counsel for the defendant objected to the  
following questions:

"Q. Do you know whether he did to Mr.  
Escoffier?"

Mr. Steuer: I objected to that on the  
ground that that is clearly incompetent and  
not binding on this defendant, and the ques-  
tion calls for his conclusion.

The Court: That is excluded.

108

Mr. Pratt: The only part excluded is  
the language, "I am sure of it?"

The Court: No, the whole answer goes  
out to that question.

Exception by the Government.

The Court: Leave out, "I am sure of it."

"Q. Was that money subsequently repaid  
to the hotel?"

Mr. Steuer: I object to that. There is  
absolutely no evidence of any knowledge on  
the part of the witness. It is perfectly  
clear from what passed before that he is

just testifying to a conclusion or judgment, 109  
as your Honor said, upon the subject. He  
certainly had no knowledge on the subject.

Objection sustained. Exception by the  
Government.

Mr. Pratt: Now, I offer the Exhibit SN1,  
that pink sheet of paper.

The Court: Admitted.

(Printed in full at end of deposition of  
Witness Neumann.)

Mr. Thompson: I offer in evidence carbon copy of the warrant of arrest issued to  
Robert Watchorn, the Commissioner of Immigration at Ellis Island for the arrest of 110  
Robert Foreau, dated the 25th of March,  
1909, together with the endorsement on the  
back and the execution of the warrant.

The Court: Admitted and marked Exhibit  
2,

### **Exhibit 2.**

#### **WARRANT—ARREST OF ALIEN.**

**UNITED STATES OF AMERICA**  
Department of Commerce and Labor  
Washington

No. 51694/24

111

To ROBERT WATCHORN, Commissioner of  
Immigration, Ellis Island, N. Y. H., or to any  
Immigrant Inspector in the service of the United  
States.

WHEREAS, from evidence submitted to me, it  
appears that ROBERT FOREAU, alien, who landed  
at the port of New York, per SS "Mauretania,"  
on the 19th day of Sept./08 has been found in  
the United States in violation of the Act of Congress  
approved February 20, 1907, to wit:

That the said alien was induced or solicited

- 112 to migrate to this country by offers or promises of employment or in consequence of arrangements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled.

I. WM. R. WHEELER, Asst. Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and convey him before yourself to enable him to show why he should not be deported in conformity with law.

- 113 The expenses of execution and detention hereunder are authorized payable from the appropriation "Expenses of Regulating Immigration." Pending decision by the Department in this case, alien may be released upon a bond in the sum of one thousand dollars.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 25th day of March, 1909.

Wm. R. Wheeler,

Asst. Secretary of Commerce and Labor.

[SEAL.]

114

Office of the  
Commissioner of Immigration  
Ellis Island, N. Y. H.  
64905

July 26, 1909

Within warrants for the arrest and deportation of Robert Forreau, No. 51694-24, for the files of the Bureau, he having been deported per S. S. "Carmania" June 19, 1909.

Robert Watchorn,  
Commissioner.

CHARLES P. PARBURY, called as a witness 115  
on behalf of the Government, being duly sworn,  
testified as follows:

Direct examination by Mr. Thompson:

I am with the United States Immigration Inspectors, and have been detailed to Ellis Island since 1900.

On June 6, 1909, I acted as Chairman of a board of three, constituting a Board of Special Inquiry, which took testimony in a warrant case, that is, the deportation case against Robert Foreau. That testimony was transcribed and written down. This is a carbon copy of the testimony taken. 116

Q. Turn to that warrant of arrest which has been put in evidence. Was some one brought before a board of three as a result of that warrant of arrest? A. Yes.

I was Chairman of that Board and the other two members were Inspectors Converse and Toner.

The person who was brought before me stated that he came on the steamship Mauretania, arriving on September 19, 1908. He gave his name as Robert Foreau.

By the Court: 117

He was ordered deported. I have the record here. The Board recommended his deportation.

By Mr. Thompson:

The Secretary of Commerce and Labor issued a warrant of deportation.

Cross examination by Mr. Steuer:

The man who appeared before me spoke French. I do not understand French.

118 By Mr. Pratt:

There must have been an interpreter who took his testimony.

Q. Do the notes show? A. The interpreter—no, according to this record Mr. Foreau spoke English.

Q. He did speak English? A. According to this record, yes.

By Mr. Steuer:

Q. Assuming that this witness Foreau spoke only French, did not understand English at all, can you state whether or not an interpreter was present to translate what he said?

119

Objected to. Objection overruled. Exception by the Government.

A. Yes, there was.

The practice at Ellis Island is to use interpreters where a person does not understand the language thoroughly.

120 The practice with reference to deporting is that after the Board of Inquiry passes upon the case and makes a report, the report is transmitted to the Secretary of Commerce and Labor at Washington and if he approves the report he issues a warrant of deportation and subsequently the alien is deported. The record shows that that was done in this case. It shows that he was deported on the steamer Carmania, on June 19, 1909. That is the same person who is referred to in that paper marked Exhibit 1.

Mr. Thompson: I will now read the rest of the testimony of Foreau, the reading of which was suspended until after the deposition of Mr. Neumann was read, in order to show some connection between Mr. Neumann and Mr. Regan.

Q. State the substance of the conversation which

you had with Mr. Neumann at the time Mr. Neumann gave you the letter which you presented to the elevator boy? A. He told me that the Hotel Knickerbocker was a very fine hotel but not to speak about it very much on board of the ship. 121

Q. Is that all that he said at that time? A. There were some other things I cannot recollect at this time.

Q. At the time you went down to get your ticket for the ship was anyone with you? A. I went with Mr. Neumann.

Q. What did Mr. Neumann do at that time when you went down with Mr. Neumann to get the ticket, what did Mr. Neumann do, if anything? 122

The Court: He took the application blank with him and paid the passage at the office?

The Witness: Yes, sir.

Q. Mr. Neumann? A. Yes, sir, Mr. Neumann.

Q. I show you this paper, Mr. Foreau, and ask you (showing paper to witness) and ask you if you have seen it before? A. Yes, sir, that is the first application blank Mr. Neumann filled in.

Q. Who made out that application blank? A. Mr. Neumann.

Q. Where was it filled out? A. In his office at the Hotel Carlton. 123

Q. Is that his handwriting (indicating)? A. Yes.

Q. How do you know it is his handwriting? A. Because he wrote it in my presence, and he asked me several questions.

Q. (Indicating.) Whose signature is that? A. It is mine.

Q. What was done with this application? A. He sent the application to the agent of the Cunard Line.

Mr. Earley: I object to any conversation between him and—

124 Q. What was done with the new one? A. I gave it to the agent of the Cunard Line.

Q. What did the agent say to Mr. Neumann; what the agent said was in the hearing of Mr. Neumann to him? A. Yes.

Q. What did the agent say? A. The agent said that if that application was made out that way the applicant could not debark in New York.

Q. I ask you what Mr. Neumann did? A. Mr. Neumann made out a new application blank.

Q. What was done with this application blank (indicating) this one here? A. That application remained in the office and by mistake I put it in my pocket.

125 Q. What was done with the new one? A. I gave it to the agent of the Company.

Q. Did the agent accept it? A. Yes, sir.

Q. Did the agent take a copy; the new paper made out by Mr. Neumann? A. Yes.

Q. Was any money paid to the agent at this time? A. Mr. Neumann paid him 12 pounds sterling in gold.

Q. Mr. Foreau, did you give Mr. Neumann any of the money he paid to the agent? A. No, he paid it himself.

Q. Was it your money? A. No.

126 Q. Did you give Mr. Neumann any paper with respect to that money at this time? A. No, sir.

Q. Did you have any conversation with Mr. Neumann with regard to that money? A. No, not at all.

Q. Have you ever paid any of that money back to Mr. Neumann or to Mr. Began? A. Never.

Q. Has Mr. Neumann or anyone else asked you to repay it? A. Nobody, no sir.

Q. When did you first meet Mr. Neumann? A. On Friday, September 11.

Q. The day before you sailed? A. Yes, sir.

Q. Where did you meet him? A. In his office 127  
at the Hotel Carlton.

Q. You didn't have any conversation with him  
at that time? A. No, we talked about the hotel,  
that is all.

Q. You misunderstood me, did you have a conver-  
sation with Mr. Neumann at the time you first  
met him at the Carlton Hotel? A. No.

Q. Did you say anything to him or did he say  
anything to you? A. Yes, he said something.

Q. What did he say to you? A. The only con-  
versation, if I wanted a good place in a hotel.

Q. That was all he said at that time? A. There  
were other things I can't remember. 128

To the following questions the defendant ob-  
jected:

"Q. State the substance of the conversation  
which you had with Mr. Neumann at the time Mr.  
Neumann gave you the letter that you presented  
to the elevator boy?"

Mr. Steuer: I object as incompetent. If  
you were to assume that Regan sent such a  
cable as is described in this case, I do not  
think Regan became answerable for every  
sin that Neumann committed. I submit to  
your Honor that you cannot prove agency  
by showing that an agent did things clearly  
beyond his authority. 129

The Court: That is excluded.

Exception by the Government.

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CARL BAWOR, called as a witness on behalf  
of the Government, being duly sworn, testified as  
follows:

Direct examination by Mr. Pratt:

I am a United States immigrant inspector, and

130 have been for about six years. In the Spring of 1909 I arrested a person by the name of Robert Foreau.

Mr. Steuer: I will concede that the man who was arrested pursuant to the warrant that has been offered in evidence is the man that was put on the boat.

Mr. Pratt: Will you concede that he is the man that came over?

Mr. Steuer: No.

I knew that that was his name because he gave me a letter from his last employer in London.  
131 This is the letter which he gave me.

Mr. Pratt: I offer that letter in evidence.

This letter is in the exact condition that it was in when it was given to me, that writing, with ~~this~~ pasted over.

The Court: We will receive it for the purposes for which it is offered, and that only.

Mr. Pratt: So as to identify this man—not for anything else.

Received in evidence as Exhibit 3.

**Exhibit 3.**

**DEPARTMENTS.**

EAST ROOM.  
Unrivalled Cuisine.  
Service A La Carte & Prix  
fixe.

**MARBLE RESTAURANT AND  
LOUNGE.**

Luncheon 2/6  
Dinner 5'  
Supper 3/6  
or A La Carte.  
Afternoon Tea.

GRILL ROOM.  
Popular Prices.

**AMERICAN RESTAURANT.**  
American Cooking  
by an American Cook.

**BANQUETING DEPT.**  
Entrance:—Jermyn Street,  
Lift to All Floors.

**GRAND HALL & SUITE.**  
Banqueting Accommodation  
for 400.  
Balls, Wedding Receptions, &c.

**VICTORIA HALL & SUITE.**  
Banqueting Accommodation  
for 150.

**KING'S ROOM.**  
Banqueting Accommodation  
for 100.

**WEST ROOM.**  
For Parties up to 80.

**PRINCES' ROOM.**  
**CROWN ROOM.**  
For Parties up to 60.

**QUEEN'S ROOM.**  
**CARNARVON ROOM.**  
**EDINBURGH ROOM.**  
For Smaller Parties.

**MASONIC TEMPLE.**

Telephone No. 2479 Gerrard.

**THE CRITERION RESTAURANT.**

Piccadilly Circus, W.

London, September 11th, 1908.

**FOR USE ABROAD ONLY.**

This is to certify that Mr. Robert Foreau has been with us as Head Pastry Cook (Chef Pattissier) from December 21st, 1903, to September 11th, 1908, and leaves on his own accord. During the time he has been with us he has given the utmost satisfaction.

F. R. Janniky,  
Manager.

136

He gave me another piece of paper. This is the paper, this pink sheet, this exhibit dated June 15, 1909, annexed to the deposition of Mr. Neumann.

Mr. Foreau also made an affidavit before me. This is the affidavit. That is my signature on there and that is his signature also. He signed that in my presence. I swore him to it.

137

Mr. Pratt: I offer in evidence simply the signature of Robert Foreau on this affidavit for the further purpose of identity, as an inspection will show that that signature is exactly the same as the signature on the pink slip which has been already shown to have been written by Foreau.

The Court: It will be accepted for that purpose.

Received in evidence as Exhibit 4.

Ex 4

Robert Foreau

188

After I arrested Foreau we conducted him to Ellis Island for special inquiry. After that I saw him on several occasions. The last time I saw him coming down from Ellis Island, and he shook hands with me and said, "Good-bye, I am going back to Europe." I did not see him leave the Island or go on board of any boat, but he passed me at the gate, and that is the last I saw of him.

This man Foreau had a physical peculiarity, I believe his right—I don't know which exactly, but I believe his right foot was a little shorter, and he carried a cane. He was somewhat crippled.

Government Rests.

Mr. Steuer opened the case to the jury on behalf of the defendant. 139

JAMES B. REGAN, the defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Steuer:

I am the proprietor of the Hotel Knickerbocker. I have been in charge of it ever since its construction. I do not know anybody at the Carlton Hotel by the name of Neumann. I have never met a Mr. Neumann to my knowledge. I have no connection with the Hotel Carlton and have never had any connection with it, other than being a guest of the house. That was approximately five or six years ago. 140

Q. Cannot you be positive in any way as to which year it was? A. 1906, four months after I went into the Hotel Knickerbocker. That is the only time I ever stopped at the Carlton Hotel. I stopped there then for ten days or two weeks. I never sent a cable to Mr. Neumann, nor did I ever send a cable to Mr. Escoffier: "Please engage Patissier, \$120 a month, passage paid, sail first boat." I never authorized anybody to send any such cable. I never knew that any such cable was sent to him or anybody else connected with us. I never sent any cable, either in 1908, or in any other year, to Mr. Escoffier or to anybody else connected with the Carlton or disconnected with the Carlton in which I said "please engage Patissier, \$120 a month, passage paid, sail first boat." 141

I remember very distinctly this gentleman who gave the name of Foreau, coming to the Hotel Knickerbocker. My office is on the first floor of the Hotel Knickerbocker, that is, one flight up. And on that same floor is my apartment. There are two rooms to my office, and the back two rooms is

142 my private office. One of the hotel boys brought up a letter and handed it to my secretary which was brought in to me, and, to be candid with you, I have forgotten what the contents of that letter was other than that it was a recommendation as to a pastry cook.

Mr. Steuer: I would like to show you, Mr. Regan, Exhibit 3 in this case. Look at it, and see if you can refresh your recollection and tell the jury whether that is the letter or not.

To be truthful with you, I don't remember. I  
143 cannot say. I told the boy to have the man shown up there. He came upstairs, and I asked him where he came from. He could not reply. He said that he did not speak English. I said, "Sit down." He sat down. I called my secretary, and I says, "Go in the apartment and see if Mrs. Regan is there and ask if she will come in and find out where this man comes from and what he wants." Mrs. Regan came to my office. I said, "Here is a man that has evidently come from the other side, and from the Carlton, and he is a pastry cook; ask him some questions; ask him where he comes from, what about him," etc., which Mrs. Regan did. The  
144 conversation, of course, I did not understand. Mrs. Regan replied to me and said, "This man is a pastry cook, and is looking for a position." I called to my secretary. I said, "Send down for Maxime"—he is the chef of the Knickerbocker. We waited for Maxime to come upstairs. I said, "Maxime interview this man, see how good he is, see what he is, and take him downstairs, and if we can use him all right, if not, do as you like with him." The conversation ended right there. That was the last until I saw the man engaged in the pastry room downstairs. This man Foreau worked

at the Hotel Knickerbocker approximately thirty or forty days, I don't know the exact time. Then he was discharged. 145

Q. Up to the time of the commencement of this suit against you did you hear that there was any claim that you had sent for this man or cabled for his or anything of that sort?

Mr. Thompson: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception by the Government.

A. Not prior to our being notified by the United States District Attorney, when the suit was commenced. I did not, directly or indirectly, in any way, shape or form ever contribute one cent to the passage money of this man Foreau. I did not return that money to anybody who laid it out at any time. I was never asked to do such a thing. 146

I did not authorize anybody to send any such telegram or know anything about it. I have no partner. I am all alone. The Hotel Knickerbocker belongs to James B. Regan.

Cross examination by Mr. Thompson:

The chef employs the help in the kitchen. He employs them at all times without my personal knowledge. 147

Q. Then you don't know whether he, or someone else on your behalf, sent such a cablegram as you have described? A. They would not have any right to do such a thing.

Q. You don't know whether they did or not? A. Decidedly not. I do not, sir.

The chef during September, 1908, was Maxime Hugue. Maxime employs all the people in the cuisine, the kitchen, who amount to about 70 people in the kitchen proper.

Q. How long had there been a vacancy in the

148 position that you put Mr. Foreau in at the time he was taken on at the hotel? A. That I cannot answer, because the pastry room is controlled and operated by from six to eight or ten men. It varies according to the business. Sometimes there are six, sometimes there are eight and sometimes there are twelve. For example, at the present moment, I guess there are twelve men in the pastry room.

Q. Don't your records in the hotel show when you take on a man and let him go? A. Decidedly, every day, I see them changed every day, according to the business and magnitude of the business of the day.

149 Q. Do you remember, had you ever looked up to see how long that position was vacant? A. I never did.

Q. Was a new position created for this man Foreau? A. Decidedly not.

Going back to my conversation when the elevator boy brought me a letter, and I sent down for Mr. Foreau and he came up to see me, he could not speak any English and I sent for Mrs. Regan. I asked Mrs. Regan to find out what this man wanted; he is evidently looking for a position; he comes from the other side. Explain to me or tell me what he knows and where he comes from. Possibly I might have said to her that he evidently came from the Carlton. I do not remember what would indicate to me that he came from the Carlton, whether it was that letter the boy brought to me from the stationery of the Carlton, or not. To be truthful with you, I don't remember whether or not that letter was signed by Mr. Neumann, and whether or not it was on the Hotel Carlton stationery, but it might have been at that. I have known Mr. Escoffier about eight years, I should imagine. And I have known of his connection with the Carlton and Ritz Carlton system of hotels.

150

Q. Do you know whether Mr. Neumann stops at the Hotel Knickerbocker in 42nd Street when in the City? A. I don't know the man at all. I have never heard of him being in New York City. I never saw him. I don't know what he looks like. I did not know he was a cook or was employed at the Carlton Hotel or that he stopped at my hotel. I don't know him; never saw him and don't know what he looks like. 151

Q. What you mean is that you cannot place a man named Neumann? A. I say I don't know him, sir. I positively state that, that I don't know him. I know the manager of the Carlton Hotel. His name is Mons. Yuset. 152

Q. What was the name of the manager of the Carlton Hotel during 1908 and 1909, during September, 1908? A. I think the man since died that was there.

Q. Did you know the staff manager of the Hotel Carlton? A. No, sir; I did not know any of the names of the men at the Hotel Carlton.

Q. But there were a number of them that you did not know by name? A. There are a number of men in the Hotel Carlton that act as reception clerks, and that I came in contact with that I never knew their names. It may possibly be that Mr. Neumann is one of those men. 153

Cables sent from a hotel abroad are sent to the private office of the Hotel Knickerbocker, James B. Regan's office, by either cable company. It makes no difference. I am continually sending them. They are paid on this end. The telegrams and cables that are received by the hotel are kept on file, if we have any, for a couple of years—may be three years, may be four years. I might go back to possibly since the infancy or beginning of the hotel.

Q. What search have you made for cables from

154 the Carlton among the files of the hotel? A. I had no reason to make any search. Why should I make a search for something that I have not got and I don't know anything about.

Q. You don't know that there is not such a cablegram in the files of your hotel? A. I don't know? Decidedly I should know. Why should I not know.

Q. You did not make any search of the files? A. I had no reason to make any search.

Those cablegrams are not filed by me personally. That would be a hard job for me or any other hotel proprietor, to file his own letters and  
155 telegrams.

Q. How do you know there is not a cablegram up there in your files? A. I have enough confidence in the people employed in my office.

Q. And that is the only way you know? A. You are asking me to answer your question. I have enough confidence in the people employed by me to know they would not file any stuff away in their files, and especially European matter, before placing it on my desk.

Q. That is all you base your opinion upon, that there is no such cablegram there? A. Well, to be candid, that is all we can base our opinion  
156 on. It is a question of confidence.

Q. Does Mr. Escoffier do certain work for you or do you have an account with him? A. Yes, sir. I purchase pickles and sauces from that gentleman for which he has a separate factory in addition to his work for the Ritz-Carlton Hotel Company. I kept an open account with him, and remitted to him every month. I had an account in the Fall of 1908, and ever since the hotel has been open, since 1906.

Mr. Escoffier did not perform any other service for me abroad. None whatever, other than his

son met me once or twice abroad, in traveling 157  
through the country, and I stopped at the hotel  
where he was manager, the Hotel Royal, Bavaria.  
I have no business abroad with him. None what-  
ever, other than the purchase of his goods. My  
records at the Knickerbocker will tell us to how  
long there had been a vacancy in the position taken  
by Mr. Foreau.

Q. You do not take a man on unless you have a  
vacancy? A. To be truthful with you, if we could  
find we could get a very good man, no matter  
when he came there, we would not let him get out  
of our sight; we would take him, even though at  
an expense to the hotel. We would create a place 158  
for him.

Q. If you did not do that, you would take him  
on to fill a vacancy? A. That I cannot answer, be-  
cause that is in the hands of my chef.

The Court: That is, there is ready em-  
ployment for good cooks?

The Witness: Well, in all parts of the  
house, your Honor, no matter whether he is  
a pastry cook or a sauce cook.

Q. Do you have French help entirely in your  
kitchen that cook, the pastry cooks? A. As much  
as we possibly can. We don't allow anything but 159  
French and English to be spoken in the kitchen,  
because we have French cooking.

Q. In that account running with Escoffier, is  
that an account with you personally, or an account  
that the Hotel Knickerbocker runs? A. It is goods  
purchased to be sold and distributed among the  
patrons of the Hotel Knickerbocker, which natu-  
rally must be an account of the Hotel Knicker-  
bocker. I remit by checks signed by me person-  
ally. The Hotel Knickerbocker belongs to James  
B. Regan, absolutely. I conduct it as an individ-  
ual, not as a corporation.

160 Mr. Foreau remained in my apartment in my office I should imagine, maybe 20 minutes, maybe 15, maybe 25. Long enough to have just such conversation as I stated to you.

Q. What was the conversation in regard to giving him a room for a day or two until he got located in the City? A. Now, whether that conversation took place while I was present—as the pastry cook and my chef and Mrs. Regan walked out of my office and out into the hall—I don't think I heard the conversation.

161 Q. You know, there was some sort of arrangement made whereby he could stay there until he could look around and get located? A. No, I don't, because the man never stayed there. I really don't remember.

Redirect examination by Mr. Steuer:

Q. You did not understand. If there was such talk, you would not? A. I only speak English.

By Mr. Thompson:

I know Mr. Gasteaud. He is not employed at the Knickerbocker.

162 Q. Was he employed at the Knickerbocker during 1908 and 1909? A. I am bad on dates. I think he was with me about one year. When at the Knickerbocker he occupied the position Maxime now occupies. He was the chef.

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Mrs. MADGE REGAN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Steuer:

I am the wife of the last witness. Mr. Regan and I and our family live in an apartment at the

Knickerbocker Hotel. The apartment is on the same floor with the office. It is on the west side of the house and the office is on the east side of the house, the same floor. I talk French. Mr. Regan does not. I remember an instance of my talking with a gentleman who was a pastry cook in the office of Mr. Regan. I testified once before about this matter. I don't remember dates at all. I remember the occurrence. 163

At that time I did not know the man's name. He just told me his name when I went into the office. I did not see any letter at that time. Mr. Regan sent his secretary into our apartment, which is on the west side of the house. When I reached Mr. Regan, his secretary said, "There is a Frenchman in here, and Mr. Regan would like to have you interpret." And I went in the office, and Mr. Regan said to me, "Here is a man that is looking for a position, and I think he is a pastry cook that comes from abroad. Anyway, see what he wants; talk to him." And he went on writing. And I spoke to the man. I said, "Good afternoon." He said, "Good afternoon." I said, "Is there anything I can do for you, please?" And he said, "I heard that there was a position vacant, or there was a vacancy here; I come to apply for it." So I told Mr. Regan that he was applying for a position as pastry cook—something to that effect. He said he was a pastry cook. Mr. Regan said to me, "Ask him where he has been working." And so I asked him and he said, "At the Carlton." And I believe he went on to expatiate on his ability, and I told Mr. Regan. And Mr. Regan said, "Well, that sounds pretty good to me." I think Mr. Regan says, "Well, send down for Maxime; see if we can use him." With that I left the office. I am not quite sure whether I was there when Maxime came up. I know I was very busy. I don't think I was. 164 165

Q. Is there anything else about the matter that

166 you recall? If there is I wish you would tell the jury? A. I don't know. Just while talking to Mr. Regan it seems to me I asked him where he was stopping and how long he had been in New York, and he said he was going to stop with some friends, or he had just come in. I did not make any arrangement with him to stop with us.

Cross examination by Mr. Thompson:

When I first saw Mr. Regan, after I came out with the secretary, Mr. Regan said to me, here is a man that is evidently a pastry cook and comes from the Carlton, and I want you to interview him.  
167 That is the substance of the conversation; the words may not be the same. Mr. Regan referred to the fact that he was a pastry cook and was looking for a position, and that he had probably come from the Carlton. You see, Mr. Regan understands the word "Cuisine" which means kitchen, and when this man came in, he no doubt asked for a position as cook.

I am making this explanation because I want to tell you that Mr. Regan guessed he was a cook. Then he said to me, "Find out what he knows—I believe he is looking," or "He is a cook"—that's it, "He is a cook."

168 Mr. Regan did not say that he came from the Carlton—I don't think he did.

I did not see any letter at all. Mr. Regan never mentioned a letter to me.

Q. How long had you been expecting a French pastry cook there in the hotel? A. I don't know that Mr. Regan was ever expecting any.

Q. Did you ever know anything about those things in the hotel? A. I know a great many things about the hotel. I do not generally know when there are vacancies in the kitchen. I left Mr. Regan when Maxime came up and went to my apartment. I did not stay with him at all, then. I

do not know how long Mr. Foreau was retained in the Knickerbocker. I know Mr. Escoffier but not Mr. Neumann. 169

Q. What was said about Mr. Foreau's wages?

A. I don't know, sir. They were never mentioned when I was speaking to him. Mr. Regan did not engage him. Mr. Regan turned him over to find out whether they could use him in the kitchen. But arrangements, so far as I was concerned, Mr. Regan did not speak to him about. I made no arrangements.

Q. And you were there all the time he and Mr. Regan were talking? A. I think I was there until Maxime came up, or they sent for Maxime, and he stayed there. Mr. Regan was very busy at his desk, and of course they had to go down to the kitchen. There is a lift that takes five or ten minutes to come up. 170

I do not remember his saying that he had come there to work for \$120 a month. I do not know that that was what he was paid. The word "Pâtissier" means pastry cook.

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MAXIME HUGUE, called as a witness on behalf of the defendant, being duly sworn, testified as follows: 171

Direct examination by Mr. Steuer:

I work at the Knickerbocker. I am a chef. I have been a chef at the Hotel Knickerbocker three years. I speak French. French is my language. I know this gentleman by the name of Foreau. I saw him for the first time at the Hotel Knickerbocker in the office of Mr. Regan. Foreau talked French. I talked French to him. I did not know Foreau before I saw him in Mr. Regan's office. I never sent a cable to Mr. Escoffier at the Hotel Carlton in London in my life. I can write English just a little. I never wrote a cable,

- 172 "Please engage Patissier, \$120 a month, passage paid, sail first boat." I never wrote that to Mr. Escoffier or Mr. Neumann, or anybody else in London. I went from Mr. Regan's office with Mr. Foreau to the kitchen. He wanted a place for work. He accepted a job. He was from Europe. He says, "I have no place. Have you a job for me."

At this point Mrs. Madge Regan was sworn as interpreter to the witness, there being no other interpreter present.

- 173 When I saw Foreau it was the time of the banquets, and I thought I could put him in a position, and I took him downstairs with me. I mentioned the salary of \$120. I made the salary for him. Up to the time when I took Foreau downstairs I never sent any message to Escoffier in London, or to any other person to send over a pastry cook.

At this point A. Krohn was sworn to act as interpreter for the witness.

Cross examination by Mr. Thompson:

- 174 When I was called up to Mr. Regan's office to see Mr. Foreau Mr. Regan said that he had asked him about a position as a cook. Mr. Regan did not say that he had come from the Carlton to work at \$120 a month. The banquet season at the Knickerbocker is in September, October, November, December, January, February, March. They have seven, eight, nine, ten, eleven pastry cooks of the character of Foreau in September, as a general rule. I don't know how long they had been wanting a cook when Mr. Foreau came. There had been a vacancy. They had expected a man for the place. I don't know where from.

Q. How much were you going to pay this man you were expecting? A. \$120.

I never had any talk with Mr. Regan about this man coming before that day. There was a man that had spoken to me, that is all. He was a baker. I don't know where he lived. He came and asked for a position. 175

Q. Another man? A. No.

Q. Did you hear anything about Foreau coming there until you saw him that day? A. I never heard the man's name nor saw him until he was presented in the office.

Q. Was there any special vacancy at that time more than what ordinarily occurs from time to time? A. There was a man missing, and besides there was extra work at that time, extra baking, and there was a vacancy. 176

I had not learned that there was a man coming from England or any foreign country. I did not know that there was a man expected to come to fill that position. This place that Foreau filled had been vacant for two or three days—three days. Before Foreau came a man named Torro was in that place. I don't know his first name. I don't know where he lived. He left a few days before Foreau came. I know Mr. Escoffier and Mr. Gasteaud very well. I correspond with them the first of the year, the greetings. I never ask them to furnish help there at the hotel. I never received any cablegrams from Escoffier or from Mr. Neumann. I don't know him. 177

Q. Any from the Hotel Carlton in London?  
A. I don't know him.

The Court: Or from anybody else in that hotel?

A. I never heard of Mr. Gasteaud.

Defendant Rests.

Testimony Closed.

Adjourned to Thursday, February 8, 1912, at 10 A. M.

178 Mr. Steuer summed up to the jury on behalf of the defendant.

Mr. Thompson summed up to the jury on behalf of the Government.

179 The Court: Mr. Foreman and Gentlemen of the jury. This action is based on the Act of Congress of February 20, 1907, and upon Sections 4 and 5 of that Act. I hardly need read it to you, because it has been read before. But, perhaps I had better, that you may distinctly understand its import. The 4th Section is, that it shall be a misdemeanor for any person, company, partnership or corporation, in any manner whatsoever to prepay the transportation, or in any way to assist or encourage the importation or immigration of any contract laborer or contract laborers, unless such contract laborer or laborers are exempt under the terms of the two previous sections of this Act. And it further provides that for every violation of any of the provisions of that section there shall be a fine in the sum of \$1,000. The exception, however, the only one that can possibly affect this case, as I understand it, is persons employed strictly as personal or domestic servants. Counsel for the defendant have made no question as to that exception.

180 Now, in order to find a verdict for the Government in this case, you must be satisfied that the Government is right about it, as has been held by the Court of Appeals in this case, beyond a reasonable doubt. That is, the evidence must convince you that the charge in this complaint is sustained beyond any doubt that you have that reasonably arises in your minds.

It has been suggested that you are not to consider the fact that I overruled a motion that a verdict be ordered for the defendant, as indicating that I think you ought not to find a verdict for the defendant. That is true. I am not here to

try the issues of fact. The only question presented in that motion was whether, as a matter of law there was an issue of fact for you to pass upon. I held that there was. 181

Now, if I allude to any of the evidence in this case, you are not to gather from that what I think about it as to the facts, because the facts you are the triers of.

There has been evidence introduced here on the part of the Government of the sending of a cablegram, which was received, as you remember, under the objection and exception of the defendant, as a piece of evidence in the chain of evidence that may be made out in the case. And that of itself is not sufficient, because it does not show who in fact sent it, if sent at all. The original cablegram would be the thing to prove that fact. I stated at the time of the introduction of that testimony, that if the jury found from what occurred—other acts of the defendant—corroborative of that, then they might find that the cablegram was sent. The case seems to hinge on what occurred when this witness or immigrant, Foreau, appeared at the Knickerbocker Hotel and at the office of the defendant. 182

Now, what has been said about receipt of the cablegram is simply a circumstance which must be construed upon the theory of innocence, if consistent. Now, you get down to that talk—and it really hinges right on the talk that Foreau says he had with Mrs. Regan in the presence of the defendant Regan. And in order to find a verdict for the Government, you must be satisfied beyond a reasonable doubt, as I have explained, that Foreau's statement as to that talk was true, or substantially true. Otherwise there is nothing to connect this defendant with the bringing in of this laborer under a contract. 183

Now, as to that, the Government say that it

184 was consistent with the circumstances, the story that has been told, the circumstances that he landed here and went directly to that hotel; that he left home for that purpose; hastened away for that purpose; while the defendant says there is no evidence before you except Foreau's to show that he did go direct to that hotel; aside from his evidence, there is nothing to show where he first went. Then, they say that the story he told of that conversation was inconsistent. Now, that addresses itself entirely to you.

185 The claim of the defendant is that when Foreau in testifying on the former trial, stated what was said—first, he did not state the whole. And then he was again inquired of about it, and finally he says this, as to what Mrs. Regan says: "Is it you who came from London? Is it you, Mr. Robert Foreau who has been sent to us by Mr. Neumann from the Carlton Hotel in London at the rate of \$120 a month?"

186 Now, the Government say that that is consistent with the facts. The defendant says that when you study the language used by the witness, it shows of itself a careful preparation to bring into Court just such words as are essential to establish the defendant's guilt in this case, and that no ordinary immigrant coming to this country could have known that those words were essential to conviction, unless it was a put-up job. And they say that Neumann and Foreau are the ones who did it. And they argue from that fact that the Government, not having produced Gasteaud—if that is the name, and another witness, Escoffier, although right there taking Neumann's deposition and did not take Escoffier, and Gasteaud being here in this country, at Pittsburg, I believe, and yet not appearing, that that is a fact for you to consider as bearing upon the honesty of this man Foreau and Neumann, witnesses for the Government.

Now, in considering the weight you will give to

the testimony of the witnesses, you will consider 187  
their interest; that Foreau was offended at being  
discharged; Neumann was his friend, and they  
were interested in this matter. You will consider  
that.

You will also consider the interest of the de-  
fendant and his wife in giving their evidence, and  
give to each the weight that you think it is fairly  
entitled to.

Now, this pink slip has been discussed consid-  
erably, and only admitted upon the theory that you  
will find that Neumann was the agent of the de-  
fendant Regan, and that can only be found upon  
the evidence that is here—not mere conjecture— 188  
not to guess at it. It must be found by the evi-  
dence—all the evidence and all the circumstances  
of the case. And whether you give that credence,  
or not, depends entirely upon how you find the  
facts. If it was a matter that was put up between  
these two men, then the defendant contends that  
that slip, having written into it the word “agree-  
ment” was made for the sole purpose of establish-  
ing this fact, and carefully kept to be produced  
in Court, if necessary.

You will consider these circumstances and then  
give to that paper such weight as you say it is en-  
titled to. 189

This letter of introduction,—you have heard the  
comment of counsel as to the pasting over,—its  
appearance here,—you will give that such weight  
as you think it deserves, as bearing on the claim  
presented on the part of the Government, and on  
the part of the defendant.

Now, I have commented upon the weight of evi-  
dence which, as I said before, has been established  
by the Circuit Court of Appeals of this Court. In  
order to find this defendant guilty you must in  
effect say that he violated Section 4 of the Act that  
I read to you, which is made a misdemeanor, with-

190 out naming any penalty except the \$1,000 in Section 5. This theory as to the weight of evidence is fairly consistent with justice,—because this means a great deal to any man. So that the jury should be careful what kind of a verdict they find in such a case as this.

If you are satisfied beyond a reasonable doubt that this defendant did what the government has charged him with, then, whatever the consequences may be, it is your duty to find a verdict for the Government. But, if you have any reasonable doubt, in view of all the evidence, then it is your duty to acquit.

191 Mr. Thompson: I desire to except to those portions of your Honor's charge where you charge that the Government must prove its case beyond a reasonable doubt. I desire to request you to charge that the Government is bound to prove its case only by a preponderance of the evidence. And further, that the Government is not required to prove its case beyond a reasonable doubt. I make those requests for you to charge. I appreciate that your Honor is bound by this decision of the Circuit Court of Appeals.

192 The Court: They must find the facts claimed by the plaintiff beyond a reasonable doubt, otherwise they should acquit. The Government must prove its case beyond a reasonable doubt. That is the law laid down by the Circuit Court of Appeals for this Circuit, and that is the law of this case.

Mr. Thompson: Will your Honor, for the purposes of the record, formally pass upon my request to charge?

The Court: I have stated the law of this case.

Mr. Thompson: Then, I may consider them as denied?

The Court: I cannot do anything further.

Mr. Thompson: I want my exception noted for the purposes of the record.

The Court: Mr. Foreman, you may retire and consider the case, and if you want any of these exhibits, whatever you choose you may have. 193

The jury retired, and returned into Court with a verdict in favor of the defendant.

Mr. Thompson: I would like to make the motion now to set aside the verdict, and for a new trial, on the ground that the verdict is contrary to the evidence and against the weight of the evidence, and contrary to law, and upon all of the grounds specified in Section 999 of the New York Code of Civil Procedure.

The Court: You may enter that motion as overruled, and judgment on the verdict. 194

Mr. Thompson: Then, I take an exception.

It is hereby stipulated that the foregoing bill of exceptions be settled and signed as a true and correct record in the form proposed.

Dated, New York, June 3, 1912.

HENRY A. WISE,  
United States Attorney for  
the Southern District of New York,  
Attorney for Plaintiff.

MAX D. STEUER,  
Attorney for Defendant. 195

For as much as the exceptions, matters and things could not otherwise appear in the record, I have settled and signed this bill of exceptions on the prayer of the plaintiff by its counsel, entered as ordered that the same be filed as a part of the record herein *nunc pro tunc* as of the date of the trial.

Dated, New York, June 3, 1912.

JAMES L. MARTIN,  
U. S. D. J.

[Filed, June 7, 1912.]

**Assignment of Errors.****UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

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UNITED STATES OF AMERICA

v.

JAMES B. REGAN.

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Now comes the United States of America, by  
197 Henry A. Wise, United States Attorney for the  
Southern District of New York, its attorney, and  
makes and files the following assignment of errors  
upon which it will rely in the prosecution of its  
writ of error.

1. The Court erred in sustaining the defend-  
ant's objection to the question put to the witness  
Neuman as to whether the defendant had ac-  
knowledged to Mr. Escoffier the receipt of a cable-  
gram from Neuman, and in striking out the an-  
swer of the witness to that question.

198 2. The Court erred in sustaining the defend-  
ant's objection to the question put to the witness  
Neuman as to whether the passage money was  
subsequently repaid to the hotel.

3. The Court erred in sustaining the defend-  
ant's objection to the question put to the witness  
Foreau relative to the substance of the conver-  
sation which the witness Foreau had with Mr.  
Neuman at the time Mr. Neuman gave him the  
letter which he presented to the elevator boy at  
the Hotel Knickerbocker, and in excluding the  
answer of the witness Foreau to that question.

4. The Court erred in charging the jury that the plaintiff was required to prove its case beyond a reasonable doubt, that part of the charge of the Court being in words as follows: 199

"Now, in order to find a verdict for the Government in this case, you must be satisfied that the Government is right about it, as has been held by the Court of Appeals in this case, beyond a reasonable doubt. That is, the evidence must convince you that the charge in this complaint is sustained beyond any doubt that you have that reasonably arises in your minds."

200

\* \* \* \* \*

"Now, what has been said about the receipt of the cablegram is simply a circumstance which must be construed upon the theory of innocence, if consistent. Now, you get down to that talk—and it really hinges right on the talk that Foreau says he had with Mrs. Regan in the presence of defendant Regan. And in order to find a verdict for the Government you must be satisfied beyond a reasonable doubt, as I have explained, that Foreau's statement as to that talk was true, or substantially true. Otherwise there is nothing to connect this defendant with the bringing in of this laborer under a contract."

201

\* \* \* \* \*

"Now, I have commented upon the weight of evidence which, as I said before, has been established by the Circuit Court of Appeals of this Court. In order to find this defendant guilty you must in effect say that he violated Section 4 of the act that I read to you, which is made a misdemeanor, without nam-

202 ing any penalty except the \$1,000 in Section 5. This theory as to the weight of evidence is fairly consistent with justice—because this means a great deal to any man. So that the jury should be careful what kind of a verdict they find in such a case as this.

If you are satisfied beyond a reasonable doubt that this defendant did what the Government has charged him with, then, whatever the consequences may be, it is your duty to find a verdict for the Government. But, if you have any reasonable doubt, in view of  
203 all the evidence, then it is your duty to acquit.”

5. The Court erred in charging the jury that unless they found the facts claimed by the plaintiff beyond a reasonable doubt they should find for the defendant, that portion of the charge being in words as follows:

“The Court: They must find the facts claimed by the plaintiff beyond a reasonable doubt, otherwise they should acquit. The Government must prove its case beyond a reasonable doubt. That is the law laid down by  
204 the Circuit Court of Appeals for this Circuit, and that is the law of this case.”

6. The Court erred in refusing to charge as requested by the plaintiff, as follows:

“That the Government is bound to prove its case only by a preponderance of the evidence.”

7. The Court erred in refusing to charge as requested by the plaintiff, as follows:

“That the Government is not required to prove its case beyond a reasonable doubt.”

8. The Court erred in denying the plaintiff's motion to set aside the verdict and for a new trial, on the ground that the verdict is contrary to the evidence and against the weight of evidence, and contrary to law and upon all the grounds specified in Section 999 of the New York Code of Civil Procedure. 205

And the United States of America prays that the judgment herein for the errors aforesaid may be reversed and for naught held and esteemed.

HENRY A. WISE,  
United States Attorney for the  
Southern District of New York,  
Attorney for Plaintiff,  
Office and Post Office Address,  
Room 50, U. S. Court and P. O. Bldg.,  
Borough of Manhattan,  
City of New York.

206

[Filed June 11, 1912.]

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**Citation.**

By the Honorable LEARNED HAND, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to James B. Regan, 207  
Greeting:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 10th day of July, 1912, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein United States of America, is plaintiff-in-error and you are defendant-in-error to show

208 cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 11th day of June, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

209

LEARNED HAND,  
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

[Filed June 11, 1912.]

210

**Certificate as to Record on Appeal.** 211

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

*against*

JAMES B. REGAN.

It is hereby stipulated by and between the attorneys for the parties in this action that the following papers shall constitute the record on appeal to the United States Circuit Court of Appeals for this Circuit in the above entitled action, to wit: summons, complaint, answer, judgment, bill of exceptions, writ of error, citation, Clerk's certificate, and stipulation as to printing of record.

212

Dated, New York, June 11, 1912.

HENRY A. WISE,  
U. S. Attorney,  
Attorney for Plaintiff.

MAX D. STEUER,  
Attorney for Defendant.

213

[Filed, June 11, 1912.]

214     **Stipulation as to Certificate of  
Record.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,  
Plaintiff,

*against*

JAMES B. REGAN,  
Defendant.

215

It is hereby stipulated by and between the parties hereto, by their respective counsel, that the foregoing printed copy is a true transcript of the record as agreed on by the parties to the above cause.

Dated, New York, June 26, 1912.

HENRY A. WISE,  
United States Attorney,  
Attorney for Plaintiff.

MAX D. STEUER,  
Attorney for Defendant.

216

# United States Circuit Court of Appeals for the Second Circuit.

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No. 95, OCTOBER TERM, 1912.

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Argued January 13, 1913. Decided February 10, 1913.

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THE UNITED STATES, PLAINTIFF IN ERROR, v. JAMES B. REGAN,  
DEFENDANT IN ERROR.

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF NEW YORK.*

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Before Lacombe, Coxe, and Ward, Circuit Judges.

WARD, Circuit Judge:

The United States brought this action of debt against James B. Regan, proprietor of the Knickerbocker Hotel, New York, to recover a penalty of \$1,000 for assisting the importation of a contract laborer, viz., one Foreau, a citizen of France, to be employed as a pastry cook in the hotel, under Secs. 4 and 5 of the Act of February 29, 1907, which read:

"SEC. 4. (Importing contract labor a misdemeanor.) That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisions contained in section two of this act.

"SEC. 5. (Penalty for violations—suits by informer.) That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit

and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

At a former trial a judgment for the Government was reversed and the case sent back for a new trial. In the opinion then handed down we held, among other things, that the evidence offered by the Government must satisfy the jury beyond a reasonable doubt that the defendant was guilty of the offense charged, 183 F. R. 293. Upon this trial the court so charged and the jury rendered a verdict for the defendant. The Government seeks to raise this question again on the ground that the action is a civil action and in respect to procedure and proof is to be treated as such, *In re Zucker*, 161 U. S. 475; *Hepner v. United States*, 213 U. S. 103; although it is admitted the defendant is protected by constitutional guaranties, e. g. that the Fourth Amendment, securing the people "against unlawful searches and seizures," *Boyd v. United States*, 116 U. S. 616, and of the Fifth Amendment that "no one shall be compelled in any criminal case to be a witness against himself," *Lees v. United States*, 150 U. S. 476. We remain of the opinion that under this act, which makes the offense a misdemeanor, the Government, even when proceeding against the defendant for the penalty only, must furnish the degree of proof required in a criminal case. It was in our opinion so held in *Chaffee v. United States*, 18 Wall. 516. There the Government sought to recover of the defendants penalties aggregating \$800,000 and the jury rendered a verdict for \$235,680. The trial judge charged the jury:

"The proof in the outset may be defective. It may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find; for although I instruct you that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset whether a case is established by the Government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It needs not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end all reasonable doubt must be removed; but here, at this stage, you need only say 'is the case so far established as to call for explanation?'

\* \* \* \* \*

"Without exception, where a party has proof in his power, which, if produced, would render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all

doubts adversely to his defense. The same rule is applicable in a case where a party once had proof in his power which had been voluntarily destroyed or placed beyond his reach.'

"If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants, in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or that either of them, could, by their own oath, resolve all doubts on this point; if you believe this, then the circumstances of this case seem to come fully within the most necessary and beneficent rule."

This he did, relying upon the decision of the Supreme Court in *Clifton v. United States*, 4 How. 242, 246, in an action for forfeiture of property under a statute putting the burden of proof on the claimant where Mr. Justice Nelson said:

"The burden of the case was upon the claimant, and it was in this stage and posture of it that the instructions were given which are the subject of the exception; and in which the court stated, 'that the claimant knew from whom he had bought the goods, and what was their actual cost, and yet had not produced this testimony, or accounted for its absence; that to withhold testimony which it was in the power of the party to produce, in order to rebut a charge against him, which it is not supplied by other equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge. And that if the claimant had withheld testimony of his accounts and transactions with these parties (meaning the foreign houses from whom he had purchased the goods), the jury were at liberty to presume that, if produced, they would have operated unfavorably to his case.'

"The instructions had a direct reference to, and are to be construed as intended to bear upon, the matters of defence, probable cause having been shown; and upon the nature and species of the evidence relied on by the claimant in support of it; and in this aspect of the case, at least, without now referring to any other, we think they were not only quite pertinent to the question in hand, but founded upon the well established rules and principles of evidence."

Mr. Justice Field, speaking for the Supreme Court, held the charge in the *Chaffee* case erroneous, saying:

"The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the Government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the Government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt.

"We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The case of *Clifton v.*

*United States*, in 4 Howard, cited by the court below, was decided upon a statute which cast the burden of proof upon the claimant in seizure cases after probable cause was shown for the prosecution, and, therefore, has no application. The instruction sets at naught established principles and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction.”

Not a word was said by the court nor by either counsel in the arguments as printed in the report to the effect that the trial court erred in charging that the plaintiff was bound to convince the jury beyond a reasonable doubt or that the case should be reversed because the defendant was denied his constitutional right not to incriminate himself. What was criticized by counsel and held erroneous by the court was the manner in which the trial court said belief beyond a reasonable doubt might be arrived at, viz., by a presumption. True, it was said this method would turn the defendant's right not to testify into an instrument for his sure destruction. It would, however, have been perfectly simple (if the Supreme Court thought that only a preponderance of proof was required) to dispose of the case by saying that the whole foundation of the charge was wrong. It is incredible that entertaining such a view, it would have sent the cause back for a new trial without the slightest intimation on the subject. In addition to this is the forfeiture case under the same statute of *Lilienthal v. United States*, 97 U. S. 237. The claimant there contended that proof beyond a reasonable doubt should have been required as in the *Chaffee* case, *supra*. Mr. Justice Clifford, without the least intimation that such proof was not properly required in the *Chaffee* case, distinguished it, saying:

“Suggestion was made during the argument at the bar that the court erred in not instructing the jury that they could not find that the property was forfeited unless the matters charged were proved beyond a reasonable doubt; but no such exception was taken at the trial, nor is any such complaint set forth in the assignment of errors; nor is there anything in the case of *Chaffee v. United States* (18 Wall. 516) which conflicts in the least with the views here expressed, as is obvious from the fact that the two cases are radically different, the present being an information against the property, and the former an action against the person to recover a statutory penalty. Information *in rem* against property differ widely from an action against the person to recover a penalty imposed to punish the offender. But they differ even more widely in the course of the trial than in the intrinsic nature of the remedy to be enforced.”

We can not reconcile the contention of the Government with these two decisions and as this was the error principally relied on and we discover no merit in the other assignments, the judgment is affirmed.

A. S. Pratt, Asst. U. S. Attorney, for the Plaintiff in Error.  
J. A. Leve, for the Defendant in Error.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 20th day of February, one thousand nine hundred and thirteen.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

THE UNITED STATES, PLAINTIFF IN ERROR, *v.* JAMES B. REGAN,  
DEFENDANT IN ERROR.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

E. H. L. A. C. C. It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(Endorsed: ) United States Circuit Court of Appeals Second Circuit. *U. S. v. Jas. B. Regan.* Order for mandate. United States Circuit Court of Appeals Second Circuit. Filed Feb. 24, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 80 (1 to 77) inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States *against* James B. Regan, as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of March, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-seventh.

[SEAL.]

(Sgd.)

WM. PARKIN, *Clerk.*

○



79 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 20th day of February, one thousand nine hundred and thirteen.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, circuit judges.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

JAMES B. REGAN, DEFENDANT IN ERROR.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

E. H. L.

A. C. C.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

80 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. vs. Jas. B. Regan. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 24, 1913. William Parkin, clerk.

81 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 80, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States against James B. Regan, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 31st day of March, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the said United States the one hundred and thirty-seventh.

[SEAL.]

WM. PARKIN, *Clerk.*

## 82 UNITED STATES OF AMERICA, ss:

*The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:*

Being informed that there is now pending before you a suit in which the United States is plaintiff in error and James B. Regan is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court

83 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 3d day of May, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

JAMES H. MCKENNEY,

*Clerk of the Supreme Court of the United States.*

84 (Indorsed:) File No. 23621. Supreme Court of the United States, No. 1046, October term, 1912. The United States vs. James B. Regan. Writ of certiorari.

85 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated May 8th, 1913.

[SEAL.]

WM. PARKIN,

*Clerk of the United States Circuit Court of Appeals for the Second Circuit.*

86 In the Supreme Court of the United States, October term, 1912.

THE UNITED STATES, PETITIONER,	} No. 1046.
vs.	
JAMES B. REGAN.	

*Stipulation as to return to writ of certiorari.*

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the record now on file in the

Supreme Court of the United States shall constitute the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted herein.

JAMES C. McREYNOLDS,  
*Attorney General.*

MAX D. STEUER,  
*Counsel for Respondent.*

MAY 5, 1913.

(Endorsed:) U. S. vs. Regan. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed May 8th, 1913. William Parkin, clerk.

87 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. United States v. James B. Regan. Return to certiorari. 1046. 23621. Office of the clerk. Received May 10, 1913. Supreme Court U. S.

(Indorsement on cover:) File No. 23621. Supreme Court U. S. October term, 1912. Term No. 1046. The United States, petitioner, vs. James B. Regan. Writ of certiorari and return. Filed May 10, 1913.





# In the Supreme Court of the United States.

OCTOBER TERM, 1912.

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THE UNITED STATES, PETITIONER,	} No. —.
v.	
JAMES B. REGAN.	

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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*To the Chief Justice and Associate Justices of the Supreme Court of the United States.*

The United States, by its Attorney General, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals in the above entitled cause.

## QUESTION INVOLVED.

This case presents the question whether, in a *civil* suit to collect the penalties provided by sections 4 and 5 of the immigration act of February 20, 1907 (34 Stat. 898), for importing alien contract laborers, the Government must prove its case beyond a reasonable doubt, or whether it is sufficient if the case be sustained by a preponderance of the evidence, as in other civil suits.

**REASONS FOR THE ALLOWANCE OF THE WRIT.**

The ruling of the Circuit Court of Appeals for the Second Circuit upon the question stated is in conflict with decisions of the Circuit Courts of Appeals for the First, Fifth, and Sixth Circuits, as well as opposed in principle to the decisions of this court in similar cases.

**STATEMENT OF CASE.**

This is a civil action by the Government to recover from the defendant the penalty of \$1,000 prescribed by law for importing an alien contract laborer. On the first trial the jury returned a verdict in favor of the United States. This judgment was reversed by the Circuit Court of Appeals on the ground, in part, that error had been committed in refusing to instruct the jury that the evidence must satisfy them beyond a reasonable doubt of the guilt of the defendant. (183 Fed., 293.) Upon a retrial of the case the Circuit Court instructed the jury in accordance with the rule laid down by the Circuit Court of Appeals. A verdict in favor of the defendant followed. (R., 60 and 65.) The case was again taken to the Circuit Court of Appeals, this time by the Government, but that court adhered to its former ruling as to the degree of proof necessary, and affirmed the judgment.

**THE STATUTE.**

The immigration act of February 20, 1907 (34 Stat., 898), under which the present suit was instituted, provides:

SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

**CONFLICTING DECISIONS OF OTHER CIRCUIT COURTS OF  
APPEALS.**

In *New York Cent. & H. R. Railroad Company v. United States* (165 Fed., 833, 837, 839), which was a civil suit to recover a penalty under the so-called twenty-eight hour law of June 29, 1906 (34 Stat., 607), the Circuit Court of Appeals for the First Circuit said:

Penal actions are for some purposes criminal in their nature, so that they are subject to certain provisions of the Constitution of the United States with reference to constitutional guaranties; yet, so far as the ordinary rules of pleading and *proof* are concerned, a suit like this is to be regarded as merely a civil proceeding. \* \* \*

\* \* \* \* \*

Under these circumstances, it follows that the United States were bound to support their case before us by only a preponderance of the evidence; \* \* \*

In *St. Louis So. West. Ry. Co. v. United States* (183 Fed., 770), which was a civil suit to recover a penalty under the safety-appliance act of March 2, 1893 (27 Stat., 531), the Circuit Court of Appeals for the Fifth Circuit held that "the United States may recover upon the preponderance of evidence."

In *United States v. Illinois Central Railroad Company* (170 Fed., 542), which was a civil suit to recover a penalty under the safety-appliance act (27 Stat., 531), the Circuit Court of Appeals for the Sixth Circuit held that it was sufficient if the evidence preponderates, and that it need not be such as to remove all reasonable doubt.

## OPPOSING DECISIONS OF THIS COURT.

This court has held that, in civil suits to recover penalties like those in the case at bar, the trial court may direct a verdict in favor of the Government, thus adopting the rule of procedure applicable to civil cases. (*Hepner v. United States*, 213 U. S., 103; *United States v. Stevenson*, 215 U. S., 190.) Many of the State cases upon which the opinion in the *Hepner* case was partly rested dealt with and rejected the contention that the plaintiff must make out its case beyond a reasonable doubt.

This court has also held that in civil suits to recover penalties the defendant need not be confronted with the witnesses against him, and that such suits may be brought in any district where the defendant may be served with process. (*United States v. Zucker*, 161 U. S., 475.)

In *C. B. & Q. Ry. v. United States* (220 U. S., 559) an action for penalties under the Safety Appliance Act was said to be civil, not criminal, and the enforcement of such penalties not governed by considerations controlling the prosecution of criminal offenses.

In *Oceanic Steam Navigation Co. v. Stranahan* (214 U. S., 320) it was held to be within the competency of Congress, when legislating as to matters exclusively within its control (i. e., the admission of aliens into the country), to impose appropriate obligations and sanction their enforcement by reasonable money penalties, and to give to executive officers the power

to enforce such penalties without the necessity of invoking the judicial power.

It is clear, therefore, that the Circuit Court of Appeals for the Second Circuit was in error in holding that a civil suit to collect penalties is subject to the strict requirements as to proof applicable to criminal cases. As above indicated, this view is contrary to the principles announced by this court in respect to such suits, as well as in conflict with the decisions of other Circuit Courts of Appeals.

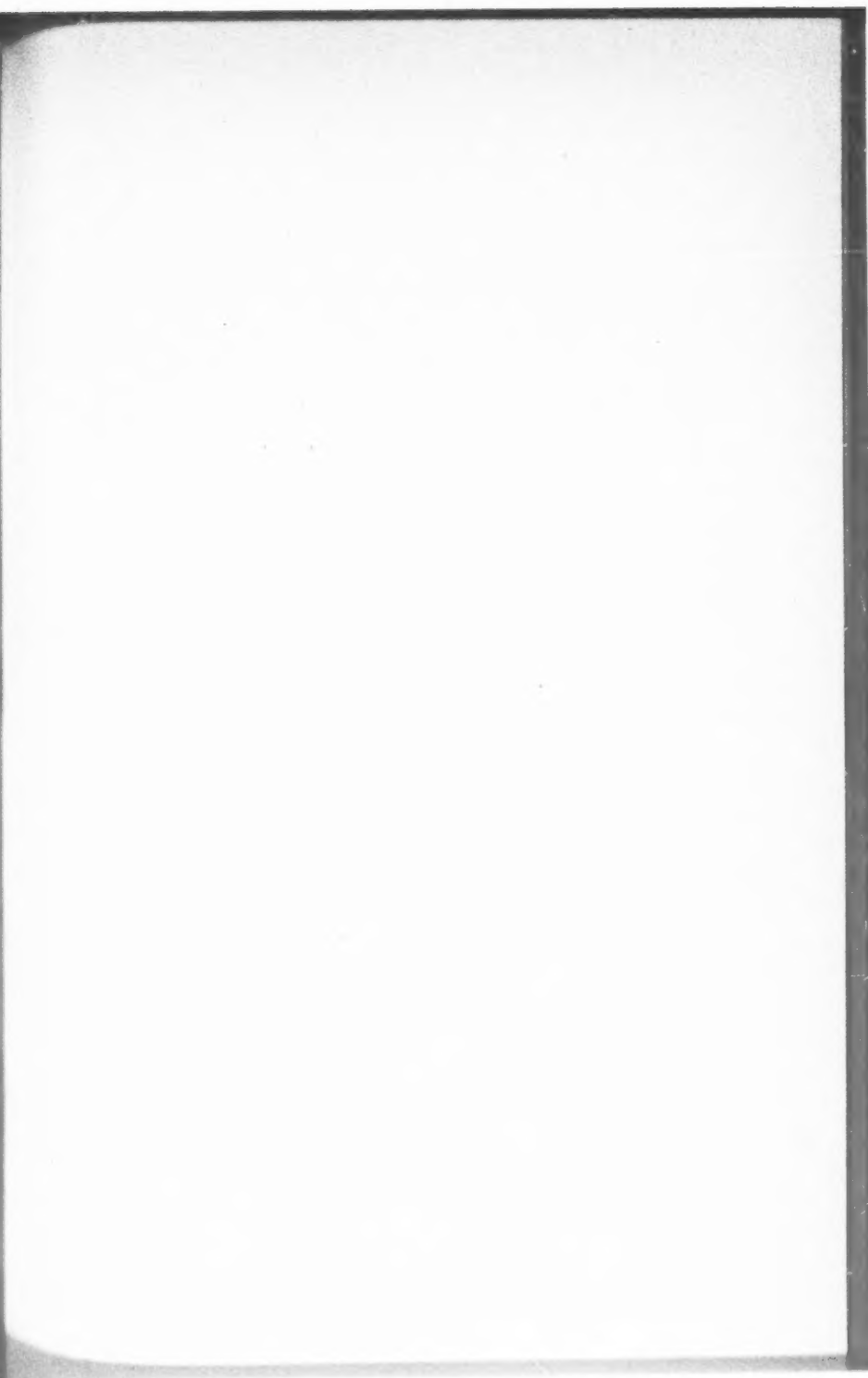
It is respectfully submitted that a writ of certiorari should issue as prayed.

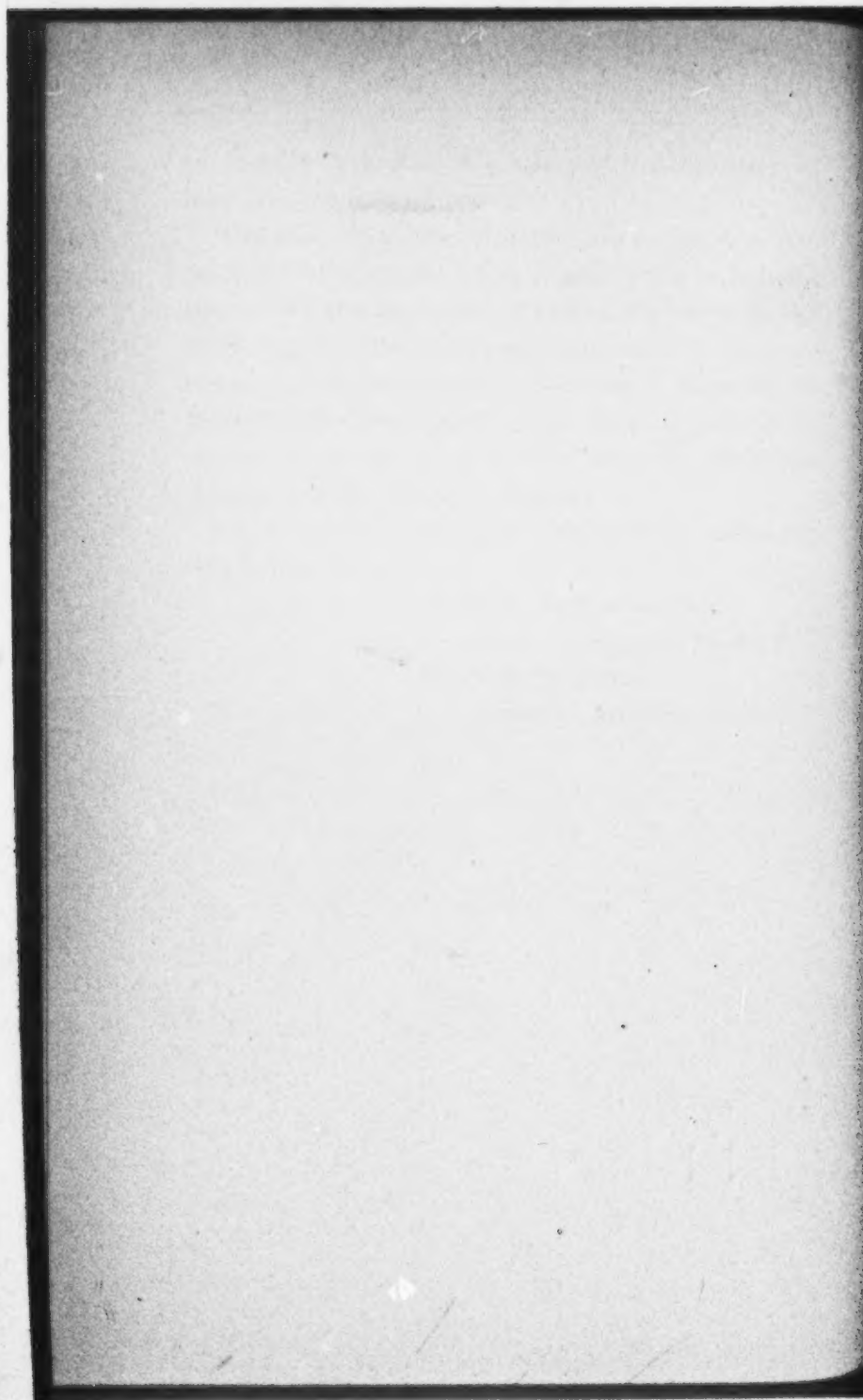
JAMES C. McREYNOLDS,

*Attorney General.*

WILLIAM R. HARR,

*Assistant Attorney General.*





# Supreme Court of the United States

OCTOBER TERM, 1912.

THE UNITED STATES,  
Petitioner,

against

JAMES B. REGAN,  
Respondent.

## MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

### QUESTION INVOLVED.

The government contends that in a suit to collect the penalties provided by Sections 4 and 5 of the Immigration Act of February 20th, 1907 (34 Stat. 898) for a violation thereof (which act characterizes a violation as a misdemeanor) that the government need only prove its case by a preponderance of the evidence.

The defendant maintains that this writ should not be granted for the following reasons:

(1) Congress has by legislation so changed the character of a violation of this act as to constitute it a crime.

(2) There is no conflict of opinion between the different circuits.

(3) This Court has ruled in previous cases where the penalty to be recovered arose out of the violation of an act which Congress had characterized as a crime, that the government in order to recover must prove its case beyond a reasonable doubt.

### POINT ONE.

Congress has by legislation so changed the character of the violation of these sections of the Immigration Law so as to constitute such violation a crime.

Section 4 of the Immigration Act of February 20th, 1907 (34 Stat., 898), reads as follows:

"That it shall be a misdemeanor for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisions contained in Section 10 of the last act."

Section 4 of the Immigration Act of 1903 differs from the same section of the later act in that the earlier act provided merely "that it shall be unlawful."

Suppose that Congress instead of providing that a violation of the Act should be a misdemeanor, prescribed it to be a felony and then provided as in this Act the same punishment for a violation thereof, would the government still have to prove, in order to punish the defendant, its case only by a preponderance of the evidence? There the defendant would be in the position of a party who would stand as a convicted felon and have the consolation that he did not suffer imprisonment because the government chose to punish him through another method of procedure. Yet a misdemeanor is a crime, *Schick v. United States* (195 U. S., 65), and it is submitted that a violation of the Immigration Act of 1907 is an invasion of the right of the public and constitutes in every sense a public wrong, and to hold otherwise would be to sacrifice a great principle to a mere rule of evidence.

This Court has recognized that Congress has changed the character of the Act so as to make a violation thereof a crime.

*United States v. Stevenson*, 215 U. S.,  
190.

## POINT TWO.

The decision of the Second Circuit in this case is not in conflict with the decisions of any of the other Circuits.

In so far as the Circuit Courts have passed upon cases that have arisen under the so-called Safety Appliance Act and the Twenty-eight-Hour Law there exists a conflict of opinion as to the

amount of evidence that the government must put forth in order to sustain its case, and that conflict is due primarily to the different construction placed upon those statutes by the various Circuit Courts.

In those circuits wherein the Courts have construed those acts to be penal in nature, the rulings have been that the government must make out its case beyond a reasonable doubt, whereas in those circuits where the emphasis is laid upon the remedial purposes of those Acts the Circuit Courts have held that the government need only prove its case by a preponderance of the evidence.

So the cases cited by the petitioner which have arisen under those Acts show that decided weight has been placed upon the remedial purposes of Congress.

The opinion of the Circuit Court of Appeals in *New York Central & Hudson River Railroad Co. v. United States* (165 Fed. Rep., 833), a case arising under the Twenty-eight-Hour Law, shows conclusively that the decision was based upon a consideration of *Qui Tam* actions and it is submitted there is absolutely no element of criminality involved in such actions; and in *Qui tam* actions it is never the State that is the prosecutor.

The title of the Safety Appliance Act is marked enough to indicate the intent of Congress:

“An act to promote the safety of employees and travelers upon railroads.”

This Court is respectfully referred to pages 14, 15, 16 and 17 of the brief submitted by the defendant in the Court below and which is hereto annexed.

How can an Act which provides that a violation of it shall be a crime be compared to an act

which has for its main and only purpose the promotion of the welfare and safety of the employees of the railroad engaged in interstate commerce?

It is submitted that there is not one Circuit that has ever held that where the government seeks to recover a penalty for a violation of an act which violation Congress has termed a crime that the Government need only prove its case by a preponderance of the evidence. Whereas, on the contrary, we have the decision in *United States v. Shapleigh* (54 Fed Rep., 126), where the Court held that a statute which authorizes a State to recover, in a civil suit penalties prescribed for the commission of a crime, the Government must prove its case beyond a reasonable doubt in order to recover such penalties.

### POINT THREE.

This Court has ruled in previous cases that where the penalty to be recovered arose out of the violation of an act which Congress has characterized as a crime, that the government in order to recover must prove its case beyond a reasonable doubt.

- Lilienthal v. United States* (97 U. S., 237);
- Chaffee v. United States* (18 Wall., 516);
- United States v. The Burdett* (9 Peter 682);
- Boyd v. United States* (116 U. S., 616).

The case of *Chaffee v. United States* (*supra*), held distinctly that in an action to recover a penalty the government must prove its case beyond a reasonable doubt.

*Hepner v. United States* (213 U. S., 103), arose under the Act of 1903 and this earlier statute did not provide that the offense should be a misdemeanor. That case came up to this Court in the following manner: The Trial Judge directed a verdict for the plaintiff (the United States), writ of error was sued out to the Court of Appeals which certified to the Supreme Court the question whether in such a suit verdict could be directed for the plaintiff. The certificate stated that it appeared by undisputed testimony that defendant had committed an offense against Sections 4 and 5 of the Act of 1903. This Court said in sustaining the *Lees* and *Boyd* cases that

*"These cases do not modify or disturb, but recognize the general rule that penalties may be recovered by civil actions although such actions may be so criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to involving or that may involve, his being guilty of a criminal offense."*

In the case of *C. B. & Q. R. R. v. United States* (220 U. S., 559), the sole question was whether knowledge on the part of the defendant was a constituent element of the offense and this Court held that the Act under which the action was brought made it mandatory upon the defendants to have these automatic couplers, and so the question of knowledge did not enter.

Justice Harlan said at page 570:

*"A breach of this duty, like the breach of most civil duties, naturally entailed a liability, not as a punishment for a criminal offense,*

but as a civil consequence, so far as the government was concerned, of a failure to perform the duty which, in the opinion of Congress, the public weal demanded should be performed by railroad companies."

The petitioner finds apparent comfort in the case of *Oceanic Steam Navigation Co. v. Stranahan* (214 U. S., 320). The question involved in that case was whether the administrative arm of the government had power to enforce the prohibition against the importation of diseased aliens by refusing to "clear" a steamship until it paid a penalty of \$100 for each and every alien who was suffering with a contagious disease that could have been discovered with reasonable care at the place of embarkation. In that very case this Court held that should such an act be deemed a crime by Congress that to enforce the punishment the offender would be entitled to a judicial trial. At page 337 Mr. Justice White said:

"We say by an analysis of the context of the act, because, as we have previously stated, its various sections accurately distinguish between these cases *where it was intended that particular violations of the act should be considered as criminal and be punished accordingly*, and those where it was contemplated that violations should not constitute crime, but merely entail the infliction of a penalty, enforceable in some cases by purely administrative action and in others by civil suit."

That was the Act of 1903 which was under consideration and certainly when Congress amended Section 4 of the Act so as to provide that a violation of the act should constitute a misdemeanor, the language of Mr. Justice White in the *Oceanic*

case applies with great vigor, to wit, *where it was intended that particular violations of the act should be considered as criminal.*

Concededly, Congress has the power to empower the administrative arm of the government to deal with the immigration of aliens, but, and we quote the language of Mr. Justice White in the Oceanic case:

“When Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, *or by confiscating their property*, we think such legislation to be valid, must provide for a judicial trial to establish the guilt of the accused.”

It is submitted that there is not that conflict between the decision of the Second Circuit in this case which arose under the Immigration Act of 1907 with those of the other Circuits, nor with this Court as to warrant this Court in granting the petitioner a writ of certiorari to the Court from the Second Circuit Court of Appeals; but, on the contrary, there is a sharp cleavage between those decisions where the penalty sought to be recovered was due to an offense which was characterized as a misdemeanor and where the offense was characterized or defined as a breach of duty and merely termed unlawful.

It is respectfully submitted that the writ of certiorari prayed for by the petitioner should not be issued.

Respectfully submitted,

MAX D. STEUER,  
Attorney for Respondent.

# In the Supreme Court of the United States.

OCTOBER TERM, 1912.

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THE UNITED STATES, PETITIONER,	} No. 1046.
v.	
JAMES B. REGAN.	

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## MOTION BY THE UNITED STATES TO ADVANCE.

The Attorney General, on behalf of the United States, moves that this cause be advanced for hearing at an early date during the next term.

The case is here on writ of certiorari granted April 21, 1913.

It presents the question whether, in a *civil* suit to collect the penalties provided by sections 4 and 5 of the Immigration Act of February 20, 1907 (34 Stat., 898), for importing alien contract laborers, the Government must prove its case beyond a reasonable doubt, as in *criminal* cases, or whether it is sufficient if the case be sustained by a preponderance of the evidence, as in other civil suits.

It is important that an early decision be had, not only because of the conflict among the Circuit Courts

of Appeals upon the question involved, but because of its effect upon the future enforcement of the provisions of the Immigration Act which prohibit the importation of alien contract laborers.

The decision will also have a direct bearing upon the enforcement of various other Federal statutes which provide pecuniary penalties for their violation that may be recovered in a civil action, e. g., the Twenty-Eight Hour Law, and the Safety-Appliance Act.

Opposing counsel concur in this motion.

JAMES C. McREYNOLDS,

*Attorney General.*

WILLIAM R. HARR,

*Assistant Attorney General.*

MAY 10, 1913.

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### ALPHABETICAL LIST OF AUTHORITIES CITED.

- Adams v. Woods*, 2 Cranch, 336.  
*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 178 Fed., 12.  
*Atchison, Topeka & Santa Fe Ry. Co. v. People*, 227 Ill., 270.  
*Boyd v. United States*, 116 U. S., 616.  
*Calcraft v. Gibbs*, 5 Term Rep., 19.  
*Campbell v. Burns*, 94 Me., 127.  
*Chaffee & Co. v. United States*, 19 Wall., 516, 538.  
*Chicago, Burlington & Quincy Ry. Co. v. United States*, 220 U. S., 559.  
*Coffey v. United States*, 116 U. S., 427.  
*Counselman v. Hitchcock*, 142 U. S., 547, 562.  
*De Veaux v. Clemens*, 17 Ohio C. C., 33.  
*Ellis v. Buzzell*, 60 Me., 200.  
*Glenwood v. Roberts*, 50 Mo. app., 167.  
*Hawloetz v. Kass*, 25 Fed., 765.  
*Hepner v. United States*, 213 U. S., 103, 108.  
*Hitchcock v. Munger*, 15 N. H., 97.  
*Houston & Texas Central R. R. Co. v. State*, 103 S. W. (Tex.), 449.  
*Ins. Co. v. Johnson*, 11 Bush (Ky.), 587.  
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*New York Cent. & Hudson River R. R. Co. v. United States*, 165 Fed., 833.  
*Norfolk & Western Ry. Co. v. United States*, 191 Fed., 302.  
*Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S., 330.  
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*Palmer v. People*, 109 Ill. App., 269.

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 Toledo, &c., Ry. Co. v. Foster, 43 Ill., 480.  
 United States v. Baltimore & Ohio R. R. Co., 170 Fed., 456.  
 United States v. B. & O. S. W. R. R. Co., 159 Fed., 35, 38.  
 United States v. Boston & Maine R. R. Co., 168 Fed., 148.  
 United States v. Brown, 24 Fed. Cases, No. 14,002.  
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 United States v. Illinois Central R. R. Co., 170 Fed., 542.  
 United States v. Illinois Central R. R. Co., 156 Fed., 182.  
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 United States v. Shapleigh, 54 Fed., 126.  
 United States v. Southern Pacific Co., 157 Fed., 459; 162 Fed., 412.  
 United States v. Southern Ry. Co., 170 Fed., 1014.  
 United States v. Stevenson, 215 U. S., 190.  
 United States v. The Brig Burdett, 9 Pet., 682.  
 United States v. Wabash R. R. Co., 182 Fed., 902, 904.  
 United States v. Zucker, 161 U. S., 475.  
 Webster v. People, 14 Ill., 365, 367.  
 Wigmore on Evidence, vol. 4, sections 2497, 2498.  
 Wilson v. Rastal, 4 Term Rep., 753, 758.

# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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THE UNITED STATES, PETITIONER,	} No. 503.
v.	
JAMES B. REGAN.	

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT OF CASE.

There are two opinions of the Court of Appeals below, rendered at different stages, but taking substantially the same ground: *Regan v. United States*, 183 Fed., 293, and *United States v. Regan*, 203 Fed., 433, Tr. p. 74.

This was a civil suit by the United States against James B. Regan, proprietor of the Hotel Knickerbocker, New York City (R., 47), to recover a penalty of \$1,000 for assisting in the importation of one Foreau, a pastry cook, the action being brought under the provisions of sections 4 and 5 of the Immigration Act of February 20, 1907, regulating the importation of alien contract laborers (R., 4-8).

There had been a previous trial of the case, but the judgment for the Government therein had been reversed by the Circuit Court of Appeals on the ground, among others, that the District Court erred in refusing to charge that, in order to warrant a recovery of the penalty, the evidence must satisfy the jury beyond a reasonable doubt. (*Regan v. United States*, 183 Fed., 293.)

The present trial resulted in a verdict for the defendant (R., 65), the District Court following the ruling of the Circuit Court of Appeals in the previous case and instructing the jury that they must be satisfied beyond a reasonable doubt that the defendant did what the Government charged him with (R., 63-64). This instruction was assigned as error by the Government in the Circuit Court of Appeals. (R., 67.)

The Circuit Court of Appeals, in an opinion (203 Fed., 433) which referred to the former opinion on the same point and discussed the subject afresh, affirmed the judgment of the District Court. (R., 73, 76.)

The case is here on writ of certiorari granted by this court at the last term.

#### STATUTE INVOLVED.

Sections 4 and 5 of the immigration act of February 20, 1907 (34 Stat., 898), provide:

SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay

the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

## **ARGUMENT.**

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**The rule as to proof beyond a reasonable doubt in criminal prosecutions has no application to civil suits to recover penalties or forfeitures.**

**This is really a question of statutory construction. The act says:**

**\* \* \* which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States.**

**Does this mean an action of debt with the ordinary forms of practice attached thereto, or does it, by some implication, engraft upon that action this incidental requirement of a criminal prosecution?**

**The decisions of this court hereinafter cited have generally been considered to have settled this question beyond further controversy, but they have not decided explicitly that this particular feature of criminal practice (the proof beyond reasonable doubt) is not requisite. In fact, the court below held that that had been decided the other way.**

## I.

Directly in point and supporting the Government's position are the following cases:<sup>1</sup>

*United States v. Illinois Central Railroad Company*, 170 Fed., 542 (C. C. A., Sixth Cir.).

*St. Louis Southwestern Railway Company v. United States*, 183 Fed., 770 (C. C. A., Fifth Cir.).

*Norfolk & Western Railway Company v. United States*, 191 Fed., 302, 308 (C. C. A., Fourth Cir.).

*New York Central & Hudson River Railroad Company v. United States*, 165 Fed., 833 (Circuit Court of Appeals, First Cir.).

*Atchison, Topeka & Santa Fe Railway Company v. United States*, 178 Fed., 12 (Circuit Court of Appeals, Eighth Cir.).

*Missouri, Kansas & Topeka Railway Company v. United States*, 178 Fed., 15 (*ib.*).

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<sup>1</sup> Except when indicated otherwise, these cases arose either under the safety-appliance act (27 Stat., 532; 28 Stat., 85), the material provision of which is as follows:

"\* \* \* shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed—

or under the 28-hour law (34 Stat., 608), the material portion of which is:

"SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business

\* \* \*

*Cf. United States v. Wabash R. Co.*, 182 Fed., pp. 802, 804; *semble* (C. C. A., Eighth Cir.), Judge (now Mr. Justice) Van Devanter concurring.

*Cf. Mont. Cent. Ry. Co. v. United States*, 164 Fed., 400, 403; *semble* (C. C. A., Ninth Cir.).

*United States v. Brown*, 24 Fed. Cas., No. 14662.<sup>1</sup>

*Hawloetz v. Kass*, 25 Fed., 765.<sup>2</sup>

*United States v. Central of Georgia Railway Company*, 157 Fed., 893 (District Court, N. Ala.).

*United States v. Philadelphia & Reading Railway Company*, 160 Fed., 696 (District Court, E. Pa.).

*United States v. Louisville & Nashville Railroad Company*, 162 Fed., 185 (District Court, So. Ala.).

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<sup>1</sup> This case arose under the internal-revenue act of 1864 (13 Stat., 223, 239), the pertinent provision of which was as follows:

SEC. 41. \* \* \* and all fines, penalties, and forfeitures which may be incurred or imposed by virtue of this act shall be sued for and recovered, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam*, or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred or before any other court of competent jurisdiction. \* \* \*

<sup>2</sup> This case arose under R. S., sec. 4901, the pertinent portion of which is as follows:

\* \* \* One-half of said penalty to the person who shall sue for the same and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed.

- United States v. Pennsylvania Railroad Company*, 162 Fed., 408 (District Court, E. Pa.).
- United States v. Chicago Great Western Railway Company*, 162 Fed., 775 (District Court, N. Iowa).
- United States v. Nevada County Narrow Gauge Railroad Company*, 167 Fed., 695 (District Court, N. Cal.).
- United States v. Boston & Maine Railroad Company*, 168 Fed., 148 (District Court, Mass.).
- United States v. Baltimore & Ohio Railroad Company*, 170 Fed., 456 (District Court, W. Pa.).
- United States v. Southern Railway Company*, 170 Fed., 1014 (District Court, W. No. Car.).
- United States v. Chicago, Rock Island & Pacific Railway Company*, 173 Fed., 684 (District Court, W. Mo.).
- United States v. Southern Pacific Company*, 157 Fed., 459 (District Court, N. Cal.).
- United States v. Southern Pacific Company*, 162 Fed., 412 (District Court, N. Cal.).

No authoritative Federal decisions support the court below, the decision of the District Court of the Western District of Kentucky (*United States v. Illinois Central R. Co.*, 156 Fed., 182) having been reversed by the Court of Appeals (*United States v. Illinois Central R. Co.*, *supra*), which thereby also overruled the similar decision of the same district court in *United States v. Louisville & N. R. Co.* (157 Fed., 979); and an early decision of the Court of Appeals for the Eighth Circuit (*United States v.*

*Shapleigh*, 54 Fed., 126) having been overruled by the court itself in its two decisions above cited.

All the state court decisions are in accord, except apparently Kentucky (*L. & N. R. R. Co. v. Comm.*, 112 Ky., 635, but see *Ins. Co. v. Johnson*, 11 Bush, 593) and Vermont (*Riker v. Hooper*, 35 Vt., 457, decided in 1862). In Illinois they take a middle ground, holding on the one hand that proof beyond reasonable doubt is not necessary, but on the other that a mere, or "very slight, preponderance" is not sufficient (*Toledo, & c., Ry. Co. v. Foster*, 43 Ill., 480; *Ruth v. City*, 80 Ill., 418; *A., T. & S. F. Ry. Co. v. People*, 227 Ill., 270; *Palmer v. People*, 109 Ill. App., 269).

*Glenwood v. Roberts*, 59 Mo. App., 167, was cited to the court below, but the later case of *State v. K. C., & c., R. R.*, 70 Mo. App., 643, supports our position.

Among the state court decisions on the precise point are:

*Louisville & Nashville Railroad Company v. Hill*, 115 Ala., 334, 352.

*Munson v. Atwood*, 30 Conn., 102.

*Webster v. People*, 14 Ill., 365, 367.<sup>1</sup>

*State v. Chicago, Milwaukee & St. Paul Railway Company*, 122 Iowa, 22.

*Roberge v. Burnham*, 124 Mass., 277.<sup>1</sup>

*O'Connell v. O'Leary*, 145 Mass., 311, p. 312, *semble* (Holmes, J.).

*Ellis v. Buzzell*, 60 Me., 209.

*Campbell v. Burns*, 94 Me., 127.

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<sup>1</sup> These cases were cited by this court in the *Hepner* case (213 U. S., p. 108).

*State ex rel. Essex v. Kansas City, Fort Scott & Memphis Railroad Company*, 70 Mo., App., 634.

*Hitchcock v. Munger*, 15 N. H., 97.<sup>1</sup>

*People v. Briggs*, 114 N. Y., 56, 64, 65.<sup>1</sup>

*De Veaux v. Clemens*, 17 Ohio C. C., 33.

*Sparta v. Lewis*, 91 Tenn., 370.

*Houston & Texas Central Railroad Company v. State*, 103 S. W. (Tex.), 449.

Wigmore supports this position. (4 Evidence, sec. 2498.)

## II.

The foundation of these cases is that these actions are essentially civil and carry none of those consequences of criminal prosecution which occasioned the rule about proof beyond reasonable doubt and which alone might justify an implication that Congress intended to have this feature attached to what it directs to be an action of debt. These verdicts do not affect life or liberty, nor do they impose the brand of criminal guilt. There is therefore no need of the extraordinary care which is needed in really criminal cases—in *favorem vitae* (*Ellis v. Buzzill, supra*). That care was the only thing which created the rule in the first instance, and, where it has no application, there is nothing upon which to base an inference that Congress intended a mixed, anomalous form of criminal debt instead of the ordinary, normal form of debt. Essentially, in substance, the action is remedial, in the

<sup>1</sup> These cases were cited by this court in the *Hepner* case (213 U. S., p. 108).

nature of tort, and so it was expressly decided (as a controlling ground of decision on one point) by this court in *Chaffee v. United States* (18 Wall., 516, p. 538), the very case chiefly relied upon by the court below. See also the discussion by Judge (now Mr. Justice) Holmes, in *O'Connell v. O'Leary* (154 Mass., p. 312).

The reasoning was thus stated by the Court of Appeals for the Sixth Circuit in *United States v. Illinois Central Railroad Company*, *supra*:

\* \* \* It is impossible for us to distinguish this case upon any substantial ground, so far as concerns the present question, from that of *United States v. Zucker* (161 U. S., 475). \* \* \*

We have referred to instances where, in the enforcement of civil liabilities, penalties incurred by wrongful neglect to discharge them are also enforced; and yet we are not aware that it has ever been supposed that the rule of the criminal law respecting the degree of proof was to be imported into the trial of the civil action. The giving of such a remedy as that specified by the sixth section, without any restriction or condition, imports an action at law with the customary incidents of such an action. Being a remedy which does not touch the person, there is no such urgency for protecting him as to require that the rules for the conduct of a civil suit should be displaced and those of a criminal proceeding be taken in. We think the law does not sanction such an anomalous compound in legal proceedings (pp. 545, 546)—

and by the Court of Appeals for the First Circuit in *New York Central & Hudson River Railroad Company v. United States*, *supra*:

Penal actions are for some purposes criminal in their nature, so that they are subject to certain provisions of the Constitution of the United States with reference to constitutional guaranties; yet, so far as the ordinary rules of pleading and proof are concerned, a suit like this is to be regarded as merely a civil proceeding. This was understood to be the law even before the ruling of Lord Kenyon in *Wilson v. Rastall* (1792), 4 D. & E., 753, 758. This was in a *qui tam* suit. There had been a verdict for the defendant. Thereupon the plaintiff moved for a new trial. Of course, if the case was a criminal one strictly, there could be no new trial, under the English practice or under the Constitution of the United States. Lord Kenyon said:

"All cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule; but I consider this as a civil action"—

and by Wigmore (4 Evidence, sections 2497, 2498):

In *criminal cases* a rule has grown up that the persuasion must be beyond a reasonable doubt. This precise distinction seems to have had its origin no earlier than the end of the 1700s, and to have been applied at first only in capital cases, and by no means in a fixed phrase, but in various tentative forms.

\* \* \* \* \*

But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case. Nevertheless, the effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. (1) It is sometimes said that, in general, wherever in a civil case a criminal act is charged as a part of the cases the rule for criminal cases should apply; but this has been generally repudiated. (2) Nor is such a doctrine better established for individual kinds of cases. *It does not apply to an action for a statutory penalty; nor to a plea of truth to an action for a defamatory charge of crime; nor to a plea of arson by the insurer in an action on a policy of fire insurance; nor in an action for support charging the defendant as the father of a bastard; nor in an action for seduction, nor a proceeding for divorce on the ground of adultery; nor in an action involving a charge of fraud; nor in proceedings for contempt.* But such a standard, or its equivalent, is applied to measure the proof of the existence and contents of a lost will, and of mutual mistake as ground for reformation of an instrument.

### III.

As we have said, this court has not decided explicitly that *in this particular feature* of practice these penalties are to be recovered "as debts of like

amount are now recovered in the courts of the United States," but it has decided the point as to substantially identical features of practice and so established the principle from which (as many of the cases above cited find) that result inevitably follows.

In *Stockwell v. United States* (13 Wall., 531) and in other cases collected and reviewed in *Hepner v. United States* (213 U. S., pp. 105-108) it held that debt lies to collect such penalties.

In *United States v. Zucker* (161 U. S., pp. 475, 481) it held that the requirement of confrontation in criminal cases was inapplicable, and that testimony might be presented by deposition. The court said:

The Sixth Amendment relates to a prosecution of an accused person which is technically criminal in its nature. In such a proceeding, the person accused is entitled to a speedy and public trial by an impartial jury of the State, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed; whereas an action, in which a judgment for money only is sought, even if, in some aspects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction. The words, in the Sixth Amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by

indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled "to be confronted with the witnesses against him," has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public offence) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed. A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment, a witness against an "accused" in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.

In *Hepner v. United States* (213 U. S., 103, 108, 109, 112), it held that the rule against directing verdicts for the Government in criminal cases was inapplicable, and sustained a verdict so directed.

In *Oceanic Steam Navigation Co. v. Stranahan* (214 U. S., 320), it even held that judicial proceedings might be dispensed with in toto and the penalty collected by an administrative officer, and in so holding said:

The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is *clearly without merit, and is not open to discussion.* (*Hepner v. United States*, 213 U. S., 103, pp. 337, 338.)

In *United States v. Stevenson* (215 U. S., 190, 199), in holding that criminal prosecution was maintainable under the statute here in question, the court reiterated (p. 199) the proposition of the *Hepner case* as applied to "a civil action for the penalty." The court said:

It is undoubtedly true that a penalty of this character, in the absence of statutory provisions to the contrary, may be enforced by criminal proceedings under an indictment. The doctrine was stated as early as *Adams v. Woods* (2 Cranch, 336, 340) wherein Mr. Chief Justice Marshall said: ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information. \* \* \* In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie" (p. 198).

And in *Chicago, Burlington, & Quincy Railway Co. v. United States* (220 U. S., 559) in holding that proof of knowledge of the defect in appliance was not necessary in a suit for the penalty under the safety appliance act, states it as "settled law" that these actions are civil, citing among others the *Hepner* and *Stranahan* cases.

These cases seem to settle the principle and to leave it, in the words of the present Chief Justice, in the *Stranahan case*, "not open to discussion" that the rules of practice applicable to criminal cases are not requisite in these.

#### IV.

The court below recognized the general character of these actions as civil (entertaining jurisdiction of the Government's writ of error, for instance, as a matter of course),<sup>1</sup> but it considered that this court had required their treatment as substantially criminal by its decisions in

*Boyd v. United States* (116 U. S., 616).

*Lees v. United States* (150 U. S., 476).

*Chaffee v. United States* (18 Wall., 516).

The *Boyd case* held that the statute requiring a defendant or claimant to produce his private books to be used against him in a penalty action was a vio-

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<sup>1</sup> See this jurisdiction discussed and decided by the Circuit Court of Appeals for the Sixth Circuit, in *U. S. v. B. & O. S. W. R. R. Co.* (159 Fed., 33, 38), cited by this court in the *Hepner case* (213 U. S., p. 108) and in *U. S. v. L. & N. R. Co.* (167 Fed., 306, 308) and see *Wilson v. Rastall* (4 Term Rep., 753, 758); *Calcraft v. Gibbs* (5 Term Rep., 19); *U. S. v. Halberstadt* (Gilpin, 268).

lation of his privilege against self-incrimination under the fifth amendment and an unreasonable search and seizure under the fourth amendment.

The *Lees* case followed with a decision that the defendant in a penalty case could not be called to the stand to testify against himself.

These two cases have almost invariably been urged to support the proposition that the general forms of criminal procedure are requisite in these cases, but they have always been distinguished upon the obvious grounds. They were pressed upon this court in the *Zucker*, *Hepner*, and *Stranahan* cases, *supra*, and in the former two instances the court dealt with them in its opinions and disposed of them as not prescribing forms of criminal practice, but merely as illustrating the liberal interpretation of the privilege against self-incrimination in line with *Counselman v. Hitchcock* (142 U. S., 547, 562).

The point was succinctly put in the *Hepner* case as follows:

So that the *Lees* and *Boyd* cases do not modify or disturb, but recognize, the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant can not be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense. Those cases do not negative the proposition that the court may direct a verdict for the plaintiff in a civil

action to recover statutory penalties or forfeitures, if the evidence is "undisputed" that the defendant by his acts incurred the penalty for the offense out of which the civil cause of action arises. That proposition has the support both of reason and authority. (213 U. S., 112.)

And in *United States v. Stevenson*, *supra* (215 U. S., p. 198) this court cited the *Lees case* as recognizing the doctrine that "a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action for debt."

The *Chaffee case* is obscured by an inexact headnote, but the explanations of it given by the courts we cite *infra* are plainly correct. The trial court had charged the jury that the refusal of the defendants to produce their books upon the trial as demanded by the Government supplied the necessity of proof of fraud. It is true that the trial court did incidentally say that it was for the Government to prove the fraud beyond a reasonable doubt, but no point came up about this, the Government having won the verdict. The reversal was because of the error in charging that the refusal to produce the books supplied the necessity for proof. The correctness of the trial court's statement about reasonable doubt was not argued to the court, was not involved, and could not possibly have had anything to do with its decision, because it was error only against the successful party below. The clauses of this court's opinion relied upon below were not even

*dicta* of this court itself, but only a part of its paraphrase (without discussion) of what had been said by the trial judge. The nub of the real decision is as follows:

The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the *right to refuse to testify*—into the machinery for their sure destruction (p. 546).

That this was the real point of the decision appears also from the interpretation given to it by one of the concurring justices (Mr. Justice Clifford) in *Lilienthal's Tobacco v. United States* (97 U. S., 237) as follows:

Suggestion was made during the argument at the bar that the court erred in not instructing the jury that they could not find that the property was forfeited unless the matters charged were proved beyond a reasonable doubt; but no such exception was taken at the trial, nor is any such complaint set forth in the assignment of errors; nor is there anything in the case of *Chaffee v. United States* (18 Wall., 516) which conflicts in the least with the views here expressed, as is obvious from the fact that the two cases are radically different, the present being an information against the property, and the former an action against the person to recover a statutory penalty. Informations *in rem* against property

differ widely from an action against the person to recover a penalty imposed to punish the offender. *But they differ even more widely in the course of the trial than in the intrinsic nature of the remedy to be enforced.*

*Instructions of an entirely different character were given in that case, as, for example, the jury were told in effect that suspicious circumstances requiring explanation, if not explained, would supply by presumption what would be sufficient to warrant a verdict of guilty; that silence supplied, in the presumption of law, that full proof which should dispel all reasonable doubt, making the inference to be drawn from silence one of law instead of fact. Palpable as those errors were, it is clear the decision of this court is correct (p. 271).*

Here it appears that the court itself was not willing to rest this point in the *Lilienthal* case upon the difference in the form of action from the *Chaffee* case ("the intrinsic nature of the remedy"), but chiefly upon the fact that a different proposition ("instructions of an entirely different character") was decided there. This conclusion is confirmed by the next paragraph, in which the court proceeded to say:

Nor is there anything in the case of *United States v. The Brig Burdett* (9 Pet., 682) that is in conflict with these several propositions. Charges of the kind contained in an information ought to be satisfactorily proved; and it is correct to say that if the scale of evidence hangs in doubt, the verdict should be in favor of the claimant, which is all that was there decided.

Jurors in such a case ought to be clearly satisfied that the allegations of the information are true; and when they are so satisfied of the truth of the charge, they may render a verdict for the Government, *even though the proof falls short of what is required in a criminal case prosecuted by indictment.* (*Insurance Company v. Johnson*, 11 Bush (Ky.), 593.)

The court seems here to limit the requirement of proof beyond reasonable doubt to a "criminal case prosecuted by indictment," and the authority it cites from 11 Bush is one of the cases denying the existence of that requirement in civil cases, even where the fact involved is a crime. It was an action for insurance, defended on the allegation that the plaintiff had fraudulently burned the house herself, or connived at the burning. The trial court had charged that such a defense must be proved beyond a reasonable doubt, but the Kentucky Court of Appeals held this to be error and reversed the case, saying on the page particularly cited by Mr. Justice Clifford:

In civil actions where the questions at issue are involved in doubt the preponderance of the evidence determines the rights of the parties, and to adjudge differently in this class of cases would be disregarding a plain elementary principle applicable to the trial of civil causes.

It seems fair to assume that Mr. Justice Clifford at least did not suppose his court had decided in the *Chaffee* case any such proposition as it is cited for.

The only other instance in which the *Chaffee* case has been cited in this court<sup>1</sup> was in the *Hepner* case, *supra*, where it is referred to (213 U. S., 108) as expressing "similar views as to the civil nature of actions for penalties," and on the page to which the court particularly referred (p. 538) the *Chaffee* case itself lays down the proposition that these actions are in the nature of tort rather than contract and therefore are not governed by the rules concerning joint liability *ex contractu*:

The action of debt lies for a statutory penalty, because the sum demanded is certain, but though in form *ex contractu*, it is founded in fact upon a tort.

The *Chaffee* case was carefully analyzed along these lines by the Circuit Court of Appeals for the First Circuit in *New York Central & Hudson River Railroad Company v. United States*, *supra*. The court held that it was not an authority for the proposition that the Government was bound to prove its case beyond a reasonable doubt, saying:

What we have said, if we are correct, determines also against the plaintiff in error its claim that the United States were bound to establish their propositions beyond a reasonable doubt. The only thing we have found that may be considered to question this are certain expressions in *Chaffee & Company v. United States* (18 Wall., 516, 544, 545, 546); but, wherever that opinion uses the expression

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<sup>1</sup> Except once in a totally unrelated point in 191 U. S., 350 n.

"reasonable doubt," it will appear on a careful examination that it originated in the Circuit Court, and was never affirmed by the Supreme Court as suitable. All the Supreme Court decided was in reference to the obligation of the defendants in the litigation there to meet a *prima facie* case; and the opinion therefore observed, very justly and wisely, that the rule of the Circuit Court justified the criticism "that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." It is true that here the Supreme Court, as it has done everywhere, recognized the fact that the suit in that case, though civil in form, was so far criminal that the constitutional guaranty against self-incrimination remained, as we have already pointed out is the fact.

In *Hawloetz v. Kass* (25 Fed., 765-766, cited by this court in the *Hepner case*) Judge Wallace said of the *Chaffee case*:

The case of *Chaffee v. United States* (18 Wall., 516) is sometimes cited by the text-writers as an authority that in an action brought by the Government to recover a penalty, the burden rests upon the Government to make out its case beyond a reasonable doubt. Whart. Ev., sec. 371. The syllabus in the report of that case is to this effect; but an examination of the opinion shows that no such point was considered by the court. The only point decided was that the instructions in the court below were erro-

neous, because they were in substance "that the Government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt."

This analysis of the *Chaffee* case was followed by the Iowa Supreme Court in *State v. Chicago, Milwaukee and St. Paul Railway Company* (122 Iowa, 22).

*Coffey v. United States* (116 U. S., 436), which was urged below (but not relied on by the court) and which may be urged again here, was distinguished in the *Zucker* case (161 U. S., at pp. 478-480). It merely held, on principles of *res judicata*, that an acquittal upon a criminal charge was a bar to a forfeiture *in rem* for the same offense.

#### CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed, with directions to reverse the judgment of the District Court, with costs, and remand the case for a new trial.

WINFRED T. DENISON,  
Assistant Attorney General.

WILLIAM R. HARR,  
Assistant Attorney General.

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**In the Supreme Court of the United States.**

OCTOBER TERM, 1913.

THE UNITED STATES, Petitioner,

*against*

JAMES B. REGAN.

No. 503.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Brief for James B. Regan.**

**STATEMENT OF CASE.**

The United States brought an action against James B. Regan, the proprietor of the Hotel Knickerbocker, New York City (R. 47), to recover One Thousand Dollars as the penalty for assisting in the importation of one Foreau, a pastry cook, under the provisions of Sections 4 and 5 of the Immigration Act of February 20, 1907, regulating the importation of alien contract laborers (R. 4-8).

There have been two trials; the first, resulted in a verdict in favor of the Government which was re-

versed (*REGAN v. UNITED STATES*, 183 Fed. Rep. 293) and the second in a verdict in favor of the defendant (R. 65).

Upon the second trial the Court charged the jury that the Government must prove beyond a reasonable doubt that the defendant was guilty of a violation of the Statute (R. 63-64).

The Circuit Court of Appeals in an opinion (203 Fed. Rep. 433) held this instruction to the jury to be correct (R. 73).

The accuracy of that ruling is the sole question involved in this appeal. The case comes to this Court on writ of certiorari granted at the last term.

#### STATUTE INVOLVED.

The defendant is charged with the violation of Sections 4 and 5 of the Immigration Act of February 20, 1907 (34 Stat., 898). They provide:

SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or im-

portation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

### **ARGUMENT.**

**By the provision of the statute (Section 4) its violation is made a misdemeanor. In order to recover the penalty provided thereby the violation must be proved beyond a reasonable doubt.**

That portion of Section 4 which makes it a misdemeanor "for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation", etc., is new in the Act of 1907. By Section 4 of the Act of 1903 it was merely declared to be unlawful "for any person, company", etc. By this change, the character of the Act has been altered so as to make a violation thereof a crime. (UNITED

*STATES v. STEVENSON*, 215 U. S. 190.) A misdemeanor is a crime (*SCHICK v. UNITED STATES*, 195 U. S. 65).

To prove a person charged, guilty of any crime, it has always been requisite that the proof should satisfy the jury beyond a reasonable doubt. The distinction must be made between cases where a violation of the Act is not characterized as a crime and those where the violation is characterized as such. With that distinction in mind all the authorities can be harmonized.

The cases cited on the brief for the United States are all cases in which the violation of the Act is not characterized as a crime (See foot-note 1, United States' brief, p. 5).

The Court below held that:

"Under this act it makes the offense a misdemeanor; the Government, even when proceeding against the defendant for the penalty only, must furnish the degree of proof required in a criminal case."

The Court would have held this as an original proposition; but believed in addition thereto that it had been so held in *Chaffee v. United States*, 18 Wall. 516 (R. 74).

Supporting the defendant's contention are the following cases:

*Lilienthal v. United States* (97 U. S. 237).

*Chaffee v. United States* (18 Wall. 516).

*United States v. The Burdett* (9 Peters 682).

*Boyd v. United States* (116 U. S. 616).

*Lees v. United States* (150 U. S. 476).

Neither *Hepner v. United States* (213 U. S. 103) nor *Oceanic Steam Navigation Co. v. Stranahan* (214 U. S. 320) avail the Government. Both of those cases arose under the Act of 1903. The violation of that Act was not characterized as a misdemeanor.

Congress clearly had the right to make a violation of the Act a crime and subject persons violating it to criminal punishment. When it does so, the form in which the Government institutes its action cannot change the requirement under the law, that before a person is convicted of crime, the evidence must satisfy the triers of the fact of that person's guilt beyond reasonable doubt.

In *Oceanic Steam Navigation Co. v. Stranahan* (*supra*) Mr. Chief Justice White said:

"When Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation to be valid, must provide for a judicial trial to establish the guilt of the accused."

In this instance the property of the defendant Regan is sought to be confiscated for his violation of Section 4 of the Act of February 20, 1907. If he violated the Act in the manner complained of that Section declares him guilty of a misdemeanor. To be declared guilty of a misdemeanor the evidence must persuade beyond a reasonable doubt. The language of the charge was therefore correct.

It would be strange indeed that for the purpose of taking the defendant's property away from him one

standard of evidence should be required; but for the purpose of putting him in jail another standard of evidence should be required. In each instance he is declared guilty of crime; in each instance he is declared guilty of the same crime. The degree of persuasion required of the evidence to convict a person of crime cannot be made dependent upon the punishment to be inflicted, for if such were the requirement, the judicial officer empowered to impose sentence would have to declare in advance of the verdict the sentence which he intended to pronounce.

### **CONCLUSION.**

**The judgment of the Circuit Court of Appeals should be affirmed with costs.**

Respectfully submitted,

MAX D. STEUER,  
Attorney for James B. Regan.

# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PETITIONER,

v.

JAMES B. REGAN.

} No. 503.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

## REPLY MEMORANDUM FOR THE UNITED STATES.

It is immaterial that the fact to be proved may be a crime, so long as the case itself is not a criminal case.

Respondent argues, in reply to our principal brief, that the principles therein established do not apply where the proof upon which the liability to the penalty depends would also be proof of a crime.

The *Zucker* case (161 U. S., 475) is directly in point (unless there is some difference between the requirement of confrontation and the measure of proof).

The very argument was explicitly discussed and disposed of by the opinion, as quoted at pages 13 and 14 of our principal brief.

In *Lilienthal v. United States* (97 U. S., 237, 271) the court held that proof beyond reasonable doubt was not requisite in a case of forfeiture *in rem*, even though the subject matter was a crime. (Principal brief, 19-21.)

*Insurance Company v. Johnson* (11 Bush (Ky.) 593), was cited by the court in that case and is in point on this particular argument. (See principal brief, p. 21.)

The following other State court decisions involving penalty cases are directly on the point:

*L. & N. R. R. v. Hill* (1897), 115 Ala., 334.

*Munson v. Atwood* (1861), 30 Conn., 102.

*People v. Briggs* (1889), 114 N. W., 56. (Cited in the *Hepner* case).

*Lyon v. Fleahmann* (1877), 34 Ohio St., 151.

*Debeaux v. Clemens* (1898), 17 Ohio C. C., 33.

*State v. Intoxicating Liquors* (1909), 82 Vt., 287 (semble).

There are a very great number of State cases holding the same proposition in ordinary civil cases. This is the almost universal rule in the State courts. See especially the following:

*Bruff v. N. W. Mut. Fire Ins. Assn.* (1910), 59 Wash., 125. (Defense of arson to an action on a fire insurance policy.)

*Grella v. Lewis Wharf Co.* (Mass., 1912), 97 N. E., 745. (Action to recover damages for death caused by negligence.)

*Fountain v. Bigham* (Pa., 1912), 84 Atl., 131. (Defense of compounding a felony.)

*Suell v. Derricott* (1909), 161 Ala., 259. (Action to recover damages for an intentional homicide.)

*Modern Woodmen of America v. Craiger* (Ind., 1910), 92 N. E., 113. (Defense of suicide to an action on an insurance policy.)

*Kramer v. Weigand* (Nebr., 1912), 135 N. W., 230.  
(Action to recover damages for rape.)

*Lay v. Linke* (1909), 122 Tenn., 433. (Justification of slander, charging perjury.)

*Kurz v. Doerr* (1904), 180 N. Y., 88. (Action to recover damages for an assault and battery.)

Of course the reason is the same as that presented in our principal brief, namely, that the rule requiring proof beyond reasonable doubt is founded upon the severities of criminal prosecutions.

*Zucker v. United States*, 161 U. S., 475, 481.

*Oceanic Steam Navigation Co. v. U. S.*, 214 U. S., 320, 336.

10 Am. Law Rev., 642, 651, 659 (Judge May).

4 Wigmore Evidence, sec. 2498.

*Ellis v. Buzzell* (1872), 60 Me., 209.

This is the idea of Mr. Justice, now Mr. Chief Justice, White's statement quoted by respondent (brief, p. 5) as from the *Oceanic Steam Navigation Co.* case, *supra*. The passage is really from the opinion of Mr. Justice Shiras in *Wong Wing v. United States* (163 U. S., 228, 237), and was quoted in the *Oceanic* case as showing how the *Wong Wing* case was distinguished.

In other words, if we understand it correctly, the Chief Justice used the quotation to point the precise distinction which we draw here.

WINFRED T. DENISON,  
*Assistant Attorney General.*

OCTOBER, 1913.

**UNITED STATES v. REGAN.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.**

**No. 503. Argued October 22, 1913.—Decided January 5, 1914.**

While in strictly criminal prosecutions the jury may not return a verdict against the defendant unless the evidence establishes his guilt beyond a reasonable doubt, in civil actions it is the duty of the jury to resolve the issues of fact according to the reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act.

In an action brought by the United States under § 5 of the Alien Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, to recover the prescribed pecuniary penalty for an alleged violation of § 4 of the act, it is not essential to a recovery by the Government that the evidence establish the violation beyond a reasonable doubt, as in a criminal case, but a reasonable preponderance of proof is sufficient.

203 Fed. Rep. 433, reversed.

THE facts, which involve the construction of the penalty provisions of the Alien Immigration Act of 1907, are stated in the opinion.

*Mr. Assistant Attorney General Denison, with whom Mr. Assistant Attorney General Harr was on the brief, for the United States:*

The rule as to proof beyond a reasonable doubt in criminal prosecutions has no application to civil suits to recover penalties or forfeitures. *St. Louis Ry. Co. v. United States*, 183 Fed. Rep. 770; *Norfolk & Western Ry. Co. v. United States*, 191 Fed. Rep. 302, 308; *N. Y. Cent. & H. R. R. Co. v. United States*, 165 Fed. Rep. 833; *Atch., Top. & c. Ry. Co. v. United States*, 178 Fed. Rep. 12; *Mo., Kan. & c. Ry. Co. v. United States*, 178 Fed. Rep. 15; *United States v. Wabash Ry. Co.*, 182 Fed. Rep. 802; *Mont. Cent. Ry. Co. v. United States*, 164 Fed. Rep. 400; *United States v. Brown*, 24 Fed. Cas. No. 14,662; *Hawloetz v. Kass*, 25 Fed. Rep. 765; *United States v. Cent. of Ga. Ry. Co.*, 157 Fed. Rep. 893; *United States v. Phila. & Reading Ry. Co.*, 160 Fed. Rep. 696; *United States v. Louis. & Nash. R. R. Co.*, 162 Fed. Rep. 185; *United States v. Penna. R. R. Co.*, 162 Fed. Rep. 408; *United States v. Chicago G. W. Ry. Co.*, 162 Fed. Rep. 775; *United States v. Nevada County R. R. Co.*, 167 Fed. Rep. 695; *United States v. Boston & Maine R. R. Co.*, 168 Fed. Rep. 148; *United States v. Balt. & Ohio R. R. Co.*, 170 Fed. Rep. 456; *United States v. Southern Ry. Co.*, 170 Fed. Rep. 1014; *United States v. Chi., R. I. & Pac. Ry. Co.*, 173 Fed. Rep. 684; *United States v. Southern Pacific Co.*, 157 Fed. Rep. 459; *United States v. Southern Pacific Co.*, 162 Fed. Rep. 412.

No authoritative Federal decisions support the court below, *United States v. Ill. Cent. R. Co.*, 156 Fed. Rep. 182, having been reversed by the Court of Appeals, 170 Fed. Rep. 542; also overruling *United States v. Louis. & Nash. R. Co.*, 157 Fed. Rep. 979; *United States v. Shapleigh*, 54 Fed. Rep. 126.

All the state court decisions are in accord, except *Riker v. Hooper*, 35 Vermont, 457, and *L. & N. R. R. Co. v. Commonwealth*, 112 Kentucky, 635, but see *Ins. Co. v.*

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Argument for Respondent.

*Johnson*, 11 Bush, 593. For cases taking a middle ground, holding on the one hand that proof beyond reasonable doubt is not necessary, but on the other that a mere, or "very slight, preponderance" is not sufficient, see *Toledo &c. Ry. Co. v. Foster*, 43 Illinois, 480; *Ruth v. City*, 80 Illinois, 418; *A., T. & S. F. Ry. Co. v. People*, 227 Illinois, 270; *Palmer v. People*, 109 Ill. App. 269.

As to *Glenwood v. Roberts*, 59 Mo. App. 167, see *State v. K. C. &c. R. R.*, 70 Mo. App. 643.

For state court decisions on this precise point see *Louis. & Nash. R. R. Co. v. Hill*, 115 Alabama, 334, 352; *Munson v. Atwood*, 30 Connecticut, 102; *Webster v. People*, 14 Illinois, 365, 367; *State v. Chi., Mil. & St. P. Ry. Co.*, 122 Iowa, 22; *Roberge v. Burnham*, 124 Massachusetts, 277; *O'Connell v. O'Leary*, 145 Massachusetts, 311; *Ellis v. Buzzell*, 60 Maine, 209; *Campbell v. Burns*, 94 Maine, 127; *Essex v. Kansas City &c. R. R. Co.*, 70 Mo. App. 634; *Hitchcock v. Munger*, 15 N. H. 97; *People v. Briggs*, 114 N. Y. 56, 64, 65; *De Veaux v. Clemens*, 17 Ohio C. C. 33; *Sparta v. Lewis*, 91 Tennessee, 370; *Houston & Tex. Cent. R. R. Co. v. State*, 103 S. W. Rep. 449; 4 Wigmore on Evidence, § 2498.

Mr. David L. Podell, with whom Mr. Max D. Steuer was on the brief, for respondent:

By the provision of the statute (§ 4) its violation is made a misdemeanor. In order to recover the penalty provided thereby the violation must be proved beyond a reasonable doubt. *Boyd v. United States*, 116 U. S. 616; *Chaffee v. United States*, 18 Wall. 516; *Hepner v. United States*, 213 U. S. 103; *Lees v. United States*, 150 U. S. 476; *Lilienthal v. United States*, 97 U. S. 237; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320; *Regan v. United States*, 183 Fed. Rep. 293; *Schick v. United States*, 195 U. S. 65; *United States v. Stevenson*, 215 U. S. 190; *United States v. The Burdett*, 9 Peters, 682.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action of debt prosecuted by the United States, under § 5 of the act of February 20, 1907, c. 1134, 34 Stat. 898, 900, known as the Alien Immigration Act, to recover \$1,000 as a penalty for an alleged violation by the defendant of § 4 of that act; and the question now to be considered is, whether it was essential to a recovery that the evidence should establish the violation beyond a reasonable doubt. The District Court instructed the jury that this measure of proof was required, and the instruction was approved by the Circuit Court of Appeals. 183 Fed. Rep. 293; 203 Fed. Rep. 433. The two sections are as follows:

"SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.

"SEC. 5. That for every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised

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labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

These sections are largely copied from the like-numbered sections of the act of March 3, 1903, c. 1012, 32 Stat. 1213, the words "shall be unlawful" in § 4 being changed to "shall be a misdemeanor," and the words "shall forfeit and pay for every such offense" in § 5, with what follows them, remaining as before.

Whether cases like this are civil or criminal and whether they are attended by the incidents of the one or the other have been so often considered by this court that our present duty, as we shall see, is chiefly that of applying settled rules of decision.

In *Stockwell v. United States*, 13 Wall. 531, the question arose, whether the United States could maintain a civil action of debt to recover a penalty incurred under the act of March 3, 1823, c. 58, 3 Stat. 781, providing that any person receiving, concealing or buying merchandise, knowing that it was illegally imported and subject to seizure, should, "on conviction thereof," forfeit and pay double the value of the merchandise, there being also a provision that the penalty might be "sued for and recovered," in the name of the United States, in any court of competent jurisdiction; and this court held that the civil action was maintainable, saying (p. 542): "But it is insisted that when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount.

It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained." And again (p. 543): "The expression 'sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature."

In *United States v. Zucker*, 161 U. S. 475, the Government by an action of debt sought to recover, as a penalty, the value of imported merchandise the entry of which had been fraudulently secured in violation of § 9 of the act of June 10, 1890, c. 407, 26 Stat. 131, 135, which subjected one committing that offense to a forfeiture of the merchandise, or its value, and to a fine and imprisonment. At the trial the United States sought to read in evidence the deposition of an absent witness theretofore taken in the cause, but the deposition was excluded upon the theory that the case, though civil in form, was in substance criminal, and therefore that the defendants were entitled, under the Sixth Amendment to the Constitution, to be confronted with the witnesses against them. This resulted in a judgment for the defendants, and when the case came here this court pronounced the trial court's theory untenable, sustained the Government's right to read the deposition, and reversed the judgment, saying (p. 481): "A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses

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of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime."

In *Hepner v. United States*, 213 U. S. 103, the Government had brought an action of debt, under § 5 of the Alien Immigration Act of 1903, 32 Stat. 1213, 1214, to recover the penalty prescribed for a violation of § 4 of that act—they being the sections from which those now under consideration are largely copied—and in the progress of the cause it became necessary for this court to consider whether a verdict for the Government could be directed under the rule applicable in civil actions. Upon an extended review of the cases bearing upon the subject, including *Atcheson v. Everitt*, 1 Cowp. 382, the question was answered in the affirmative, and it was said:

(p. 108) "It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. Of course, if the statute by which the penalty was imposed contemplated recovery only by a criminal proceeding, a civil remedy could not be adopted. *United States v. Clafin*, 97 U. S. 546. But there can be no doubt that the words of the statute on which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty. It provides that the penalty of one thousand dollars may be 'sued for' and recovered by the United States or by any 'person' who shall first begin his 'action' therefor 'in his own name and for his own benefit,' 'as debts of like amount are now recovered in the courts of the United States;' and 'separate suits' may be brought for each alien thus promised labor or service of any kind. The district attorney is required to prosecute every such

'suit' when brought by the United States. These references in the statute to the proceeding for recovering the penalty plainly indicate that a civil action is an appropriate mode of proceeding.

\* \* \* \* \*

(p. 111) "But the decision in the *Zucker* case is important in that it recognizes the right of the Government, by a civil action of debt, to recover a statutory penalty, although such penalty arises from the commission of a public offense. It is important also in that it decides that an action of that kind is not of such a criminal nature as to preclude the Government from establishing, according to the practice in strictly civil cases, its right to a judgment by depositions taken in the usual form, without confronting the defendant with the witnesses against him.

\* \* \* \* \*

(p. 115) "The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law, if the evidence is uncontradicted and raises only a question of law."

In *Atcheson v. Everitt*, approvingly cited in that case, the question for decision was, whether certain testimony, admissible by statute in civil but not in criminal causes, could be received in an action of debt for the pecuniary penalty for bribery at an election of a Member of Parliament, an act not merely prohibited but indictable as a crime. Notwithstanding the defendant's insistent objection, the testimony was held to be rightly receivable, it being said by Lord Mansfield, who spoke for the entire court (1. Cowp. 391): "Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a criminal case. It is as much a civil action, as an action for money had and received."

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In *Wilson v. Rastall*, 4 D. & E. 753, 758, also approvingly cited in the *Hepner Case*, one of the questions was, whether, after a verdict for the defendant, a new trial could be granted, upon the plaintiff's motion, in an action of debt for the pecuniary penalty for bribing voters, an indictable crime, and the court gave an affirmative answer and awarded a new trial, Lord Kenyon, Ch. J., observing: "All the cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule. But I consider this as a civil action."

In *United States v. Stevenson*, 215 U. S. 190, which was a prosecution by indictment for a violation of § 4 of the present Alien Immigration Act, the question for decision was, whether that mode of enforcing the penalty was admissible in view of the provisions of § 5 permitting a civil action. It was held that an indictment would lie, and in the course of the opinion, after observing that in the absence of some provision to the contrary a statutory penalty may be recovered by either a criminal prosecution or a civil action of debt, it was said (p. 198): "It is to be noted that this statute (§ 5 of the Immigration Act) does not in terms undertake to make an action for the penalty an exclusive means of enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the Government to this method of enforcing the law. It is not to be presumed, in the absence of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the Government the well-recognized method of enforcing such a statute by indictment and criminal proceedings." And then, after commenting upon the change in § 4 whereby the words "shall be unlawful" were replaced by "shall be a misdemeanor," and observing that the only purpose in this was to make clear the right of the Government to prosecute as for a crime, it was further said (p. 199): "Congress having

declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the Government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled [meaning in a prosecution by indictment] to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. *Hepner v. United States*, 213 U. S. 103."

The latest case in this court bearing upon the subject is *Chicago, Burlington & Quincy Railway Co. v. United States*, 220 U. S. 559, which was an action to recover penalties incurred by the violation of the Safety Appliance Acts of Congress. In the trial court the Government prevailed, and when the judgment came here for review the railway company contended that the action was in effect a criminal prosecution and in consequence not controlled by the prior decision in *St. Louis, Iron Mt. & Southern Railway Co. v. Taylor*, 210 U. S. 281, a strictly civil case arising under the same statutes and upon which the Government relied; but it was held otherwise, the court saying (p. 578): "This contention is unsound, because the present action is a civil one."

It is a necessary conclusion from these cases (1) that, as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize, and in this instance has authorized, the enforcement of such penalty by either a criminal prosecution or a civil action; (2) that the present action is a civil one and appropriate under the statute; and (3) that, if not directed otherwise, such an action is to be conducted and determined accord-

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ing to the same rules and with the same incidents as are other civil actions.

It is of no moment in this case that the act penalized, which theretofore was declared unlawful and styled an offense, was by the statute of 1907 denominated a misdemeanor, for the purpose in that, as was explained in *United States v. Stevenson*, was merely to make clear the Government's alternative right to prosecute as for a crime. There was no purpose to revoke the existing right to resort to a civil action or to take from the action any of the usual incidents of a civil case. Indeed, a purpose to the contrary is shown by the reenactment, without change, of the provision authorizing the action. It not only specifies who shall have the civil right of recovery, but also the mode of its exercise and enforcement; for it declares that the penalty "may be sued for and recovered" by the United States, or by any person, including the alien, who shall first bring the action in his own name and for his own benefit, "as debts of like amount are now recovered in the courts of the United States." This plainly contemplates that the proceedings in the action are to be in conformity with the recognized mode of adjudicating and enforcing debts of like amount in those courts, and this whether the action be by the Government or by an individual.

While the defendant was entitled to have the issues tried before a jury, this right did not arise from Article III of the Constitution or from the Sixth Amendment, for both relate to prosecutions which are strictly criminal in their nature (*Counselman v. Hitchcock*, 142 U. S. 547, 563; *United States v. Zucker*, 161 U. S. 475, 481; *Callan v. Wilson*, 127 U. S. 540, 549), but it did arise out of the fact that in a civil action of debt involving more than twenty dollars a jury trial is demandable. And while in a strictly criminal prosecution the jury may not return a verdict against the defendant unless the evidence estab-

lishes his guilt beyond a reasonable doubt, in civil actions it is the duty of the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act.

So, in providing that the penalty may be sued for and recovered as debts of like amount are recovered, we think it was intended that a reasonable preponderance of the proof should be sufficient, that being one of the recognized incidents of an action of debt as well as of other civil actions.

This is the view which other Federal courts have generally applied in the administration of statutes authorizing a civil recovery of such penalties. *United States v. Brown*, 24 Fed. Cas. 1248; *3880 Boxes of Opium v. United States*, 23 Fed. Rep. 367; *Hawloetz v. Kass*, 25 Fed. Rep. 765; *The Good Templar*, 97 Fed. Rep. 651; *United States v. Southern Pacific Co.*, 162 Fed. Rep. 412; *New York Central & Hudson River Railroad Co. v. United States*, 165 Fed. Rep. 833; *United States v. Illinois Central Railroad Co.*, 170 Fed. Rep. 542; *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 178 Fed. Rep. 12; *St. Louis Southwestern Railway Co. v. United States*, 183 Fed. Rep. 770. And such, also, is the prevalent course of decision in the state courts. 4 Wigmore on Evidence, § 2498; *People v. Briggs*, 114 N. Y. 56; *State v. Chicago, Milwaukee & St. Paul Railway Co.*, 122 Iowa, 22; *Hitchcock v. Munger*, 15 N. H. 97; *Sparta v. Lewis*, 91 Tennessee, 370; *O'Connell v. O'Leary*, 145 Massachusetts, 311, 312; *Munson v. Atwood*, 30 Connecticut, 102; *State v. Kansas City &c. Co.*, 70 Mo. App. 634; *Deveaux v. Clemens*, 17 Ohio C. C. 33; *Semon v. People*, 42 Michigan, 141; *Walker v. State*, 6 Blackf. 1; *Roberge v. Burnham*, 124 Massachusetts, 277. In the last case the Supreme Judicial Court of Massachusetts, in applying this measure of persuasion in an action for a penalty, said:

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"The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained. 2 Russell on Crimes (7th Am. ed.), 727. It often happens that civil suits involve the proof of acts which expose the party to a criminal prosecution. Such are proceedings under the statute for the maintenance of bastard children, proceedings to obtain a divorce for adultery, actions for assaults, actions for criminal conversation or for seduction, and others which might be named. And in such actions, which are brought for the determination of civil rights, the general rule applicable to civil suits prevails, that proof by a reasonable preponderance of the evidence is sufficient."

The cases upon which the defendant relies do not compel or lead to a different conclusion. While in *United States v. The Brig Burdett*, 9 Pet. 682, language was used giving color to the contention that in an action such as this the true measure of persuasion is that applied in criminal prosecutions, the court was careful in *Lilienthal's Tobacco v. United States*, 97 U. S. 237, to point out (pp. 266-267) the distinction in this regard between criminal prosecutions and civil cases, and to show (p. 272) that the case of *The Burdett* is not an authority for disregarding the distinction and that in an action to enforce a forfeiture the jury, if satisfied of the truth of the charge upon which the forfeiture depends, "may render a verdict for the Government, even though the proof falls short of what is required in a criminal case prosecuted by indictment." In *Chaffee & Co. v. United States*, 18 Wall. 516, the trial court, probably in deference to what was said in the case of *The Burdett*, had instructed the jury that proof beyond a reasonable doubt was essential to a recovery; but as the Gov-

ernment had a verdict and judgment and was not in a position to assign error upon the instruction, the case hardly can be regarded as settling the propriety of such an instruction, especially as in *Coffey v. United States*, 116 U. S. 436, 443, thirteen years later, it was plainly assumed that in such actions the true measure of persuasion is not proof beyond a reasonable doubt but the preponderating weight of the evidence. The cases of *Boyd v. United States*, 116 U. S. 616, and *Lees v. United States*, 150 U. S. 476, are without present application, for they deal with the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination, which, as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions and is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions. *Counselman v. Hitchcock*, 142 U. S. 547, 563; *United States v. Zucker*, 161 U. S. 475, 481; *Hepner v. United States*, 213 U. S. 103, 112. See also *Callan v. Wilson*, 127 U. S. 540, 549; *Schick v. United States*, 195 U. S. 65, 68.

We conclude that it was error to apply to this case the standard of persuasion applicable to criminal prosecutions; and the judgment is accordingly reversed, with a direction for a new trial.

*Judgment reversed.*